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SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 467

GEORGE W. [illegible], APPELLANT, UNITED STATES
[illegible] [illegible] PENNSYLVANIA,
APPELLEE.

APPEAL FROM THE [illegible]

FILED [illegible], 1938

SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. .....

WILLIAM H. HIATT, Warden, United States Penitentiary, Lewisburg, Pennsylvania,
PETITIONER,

vs.

BERNARD W. SMITH.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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In the United States District Court
for the Middle District of Pennsylvania

Habeas Corpus Docket, H.C. No. 199

Title of Case	*Attorneys*
In the Matter of The Application for a Writ of Habeas Corpus by Bernard W. Smith.	*For Petitioner:* Daniel F. Mathews, Esq. 913-919 University Bldg. Syracuse 2, N. Y. Frank J. McDonnell 403-405 Lincoln Trust Bldg. Scranton 3, Penna. *For Respondent:* Arthur A. Maguire, Esq. U. S. Attorney, Scranton Maj. Thayer Chapman, USA. Judge Advocate General's Office, Washington, D. C.

Docket Entries

1947	(FVF)
Jan. 2	Petition for Writ of Habeas Corpus.
Jan. 2	Order by Judge Follmer granting leave to Daniel F. Mathews, Esq. to enter his special appearance as counsel for the petitioner.
Jan. 27	Rule to Show Cause, returnable Feb. 7, 1947. Hearing on Response and Petition to be held Feb. 11, 1947, 10:00 a. m. at Lewisburg, Penna. Copies mailed counsel, Warden Hiatt, and U. S. Attorney.
Jan. 28	Response to Rule to Show Cause.
Feb. 4	Order of court to produce petitioner at hearing Feb. 11. Copies to counsel, Warden Hiatt, and U. S. Attorney.
Feb. 11	Hearing at Lewisburg, Penna.—Witness List.
April 14	Praecipe for entry of appearance by Frank J. McDonnell, Esq. 403-405 Lincoln Trust Bldg. Scranton 3, Pa. (Copy to U. S. Attorney).

June	1	Transcript of Hearing 2 11 4 Before Follmer, Judge, and Govt. Exhibit No. 1 (Photostatic copy of General Court Martial of Bernard W. Smith), and Govt. Exhibit No. 2 (copy of W.D.A.G.O. Form 170 pertaining to appointment and statement of Preferences for Reserve Officers Harry Lieberman 0-1551068).
Aug.	7	Opinion of Judge Follmer denying petition for writ and dismissing rule to show cause. (Copies of opinion mailed attorneys of record for petitioner and respondent, copy to Warden Hiatt, U. S. Attorney General.)
Aug.	7	JS6 card to Scranton.
Sept.	8	Notice of Appeal (Copy mailed to U. S. Attorney, and Maj. Thayer Chapman by petitioner's attorney). Copy mailed Circuit Court of Appeals by Clerk.
Nov.	22	Request for transmittal of record to Circuit Court of Appeals. (By petitioner)
Dec.	9	Designation of Record filed by U. S. Attorney (Copies being mailed to petitioner, and Maj. Chapman)
Dec.	9	Petition for order Under CCA-3, 5(i) Appendix.
Dec.	10	Order of Court directing original files be transmitted to Circuit Court of Appeals. (Copies mailed counsel of record)

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United States District Court
for the Middle District of Pennsylvania.

In the Matter of the Application for a Writ of
Habeas Corpus
by
BERNARD W. SMITH.

Petition for Writ of Habeas Corpus—Filed Jan. 2, 1947.

To Honorable Frederick J. Follmer, United States District Judge:

The petition of Bernard W. Smith respectfully shows to the Court:

1. That the petitioner is confined in the United States Penitentiary at Lewisburg, Pa.; that Lewisburg is within the confines of the Middle District of Pennsylvania.

2. That the petitioner herein is being presently incarcerated in said penitentiary which is under the control of William H. Hiatt, Warden of said institution, and one of the

deputy wardens and or the Secretary of War, or whoever may be in charge of the War Department.

3. That the petitioner is presently being restrained of his liberty.

4. That the petitioner is presently incarcerated pursuant to a conviction under a general courts-martial, which courts-martial was held in England in 1944.

5. That the petitioner is presently confined in the United States Penitentiary at Lewisburg, Pa. pursuant to an order made September 20, 1944, by Brigadier General Francis H. Griswold of the U. S. Army, who was the commanding general of the 8th Fighter Command at AAF Station, F-341, APO 637.

6. That the petitioner herein was convicted of a violation of the 92nd Article of War, Rape; and the 93rd Article of War, attempted rape, which crimes were alleged to have been committed on July 11, 1944, at Lawford, Essex, England.

7. That a copy of the record and transcript of the certificate of conviction are now in the possession of the Secretary of War or the Judge Advocate General's Office of the U. S. Army, together with all other pertinent records and documents in connection with this trial. Therefore the petitioner is unable to provide the Court with the necessary documentary evidence in the form of the record of trial, transcript of the minutes, certificate of con-
3 viction, etc.

8. That no previous application has been made for a writ of habeas corpus by the petitioner herein.

9. That the grounds for the petitioner's prayer for a writ of habeas corpus are as follows:

I. That the petitioner was denied his rights to due process of law as provided by the United States Constitution in that:

(a) The petitioner conclusively proved that he was in the army camp 15 minutes to half hour prior to the time that the complaint Sheila Dale (rape case) claimed he ravished her.

(b) The conviction in the case of Sheila Dale was on the uncorroborated testimony of Sheila Dale herself and was against the weight of evidence.

(c) That the crime of rape as defined in the Manual of Courts-Martial was not proven on the trial as a matter of law.

(d) The identification parade, wherein the petitioner was claimed to have been identified by the com-

plainants; was not conducted fairly and was in fact a fraud.

(e) Neither the Judge Advocate General who was the prosecuting attorney nor the Court called a certain Mrs. Kerry, who was an important witness to both the prosecution and the defense, and which witness could have completely exonerated the defendant had she been called.

(f) That the pre-trial investigating officer's report did not describe a *prima facie* case of rape or attempted rape in accordance with the Manual of Courts-Martial or Articles of War.

II. That the petitioner was not advised of his rights pursuant to the provisions of the 24th Article of War at the time he was first questioned by Lt. Todd.

III. That Lt. Todd was the accuser in fact and the original investigator of the alleged crime and later he was appointed as impartial investigator under the 70th Article of War. Lt. Todd, being the originator of the charges and the accuser in fact, was ineligible to be the impartial investigator under the 70th Article of War.

4 IV. That the investigation under the 70th Article of War was neither thorough nor impartial and further said investigation was not competently made.

V. That the petitioner was inadequately represented by counsel on said trial.

VI. That errors were committed in the course of the trial which were highly prejudicial to the defendant in that:

(a) Improper evidence was admitted.

(b) The prosecution was represented by skilled lawyers, members of the Judge Advocate General's Staff, and the petitioner was represented by a lay person, who was not familiar with legal procedure. As a result thereof, leading questions were propounded to the prosecution witnesses, which were incompetent and illegal.

(c) That incompetent evidence which was not connected up to the case at bar was admitted into evidence, which was error; the lay witnesses were permitted to testify to facts which required expert witnesses, and that expert witnesses were available.

(d) That army records of great value to the conduct of the defendant's case were not admitted into evidence, first due to the Court's error, and secondly due to counsel's incompetence.

VII. That due to inadequate representation of the petitioner in the trial no mention was made in the record concerning wide discrepancies of the prosecution witnesses, to wit:

(a) That an identification mark, a cut, was set forth in a statement by one of the complainants to be on the right hand, when in fact, there was a cut on the left hand.

(b) That the appearance of a cut and a dental impression would not be the same.

(c) That the prosecution attorneys as a matter of fact testified themselves by means of leading questions rather than permit Constable Felton to describe the laceration.

VIII. That the crime of rape was never proven.

IX. That the reviewing authorities erred in approving the sentence as a matter of law.

X. That the evidence contained in the case as a matter of law was insufficient to support the conviction and therefore the Court lost jurisdiction.

XI. The evidence was not sufficient as a matter of law to find the defendant guilty beyond a reasonable doubt and therefore the Courts-Martial lost jurisdiction.

XII. On the errors of law herein set forth and the errors of fact which amount to errors of law, and on the ground of the accumulation of errors in said trial, the petitioner was denied due process of law.

XIII. That as a result of the proceedings set forth herein the defendant's constitutional rights were denied to such an extent that the Court lost jurisdiction.

WHEREFORE, the petitioner prays that a writ of habeas corpus issue requiring the Secretary of War, Robert Patterson, and/or the Assistant Secretary of War and/or William H. Hiatt, Warden of the United States Penitentiary at Lewisburg, Pa., or the person who may be in charge of said penitentiary, to produce the body of the petitioner herein before Honorable Frederick V. Follmer, United States District Judge for the Middle District of Pennsylvania, and also produce all records, documents and reports pertaining to the conviction of the petitioner herein; and

The petitioner further prays that a writ of habeas corpus issue.

BERNARD W. SMITH,
Petitioner.

6

State of Pennsylvania,
County of Union. } ss.:

BERNARD W. SMITH, the petitioner named in the foregoing petition, being duly sworn, deposes and says: That he has heard said petition read and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

BERNARD W. SMITH.

Sworn to before me this 24th day of December, 1946.

WM. H. HIATT,
"*Warden*—Authorized by the Act of February 11, 1938, to administer oaths."

8 In the District Court of the United States
For the Middle District of Pennsylvania
(Title Omitted)

Rule to Show Cause—Filed Jan. 27, 1947

Now, to wit, January 27, 1947, upon consideration of the Petition filed in this cause, Rule is hereby granted upon William H. Hiatt, Warden, United States Penitentiary, Lewisburg, Pa., to show cause why a Writ of Habeas Corpus should not be granted.

Rule returnable February 7, 1947.

Hearing on the Petition and Response to be held on February 11, 1947, 10:00 o'clock A. M., at Lewisburg, Pennsylvania.

FREDERICK V. FOLLMER,
United States District Judge

10 In the United States District Court.
For the Middle District of Pennsylvania
(Title Omitted)

Response to Rule to Show Cause—Filed Jan. 28, 1947

Comes now the respondent, William H. Hiatt, Warden of the United States Penitentiary, Lewisburg, Pennsylvania, by Arthur A. Maguire, United States Attorney in and for the Middle District of Pennsylvania and makes answer to the petition and the rule to show cause herein.

I. Respondent admits the allegations contained in paragraphs 1, 2, 3, 4, 6, and 7 of the petition herein.

II. Respondent denies the allegations contained in paragraph 5 of the petition and alleges that petitioner is pres-

ently confined in the United States Penitentiary, Lewisburg, Pennsylvania, under the following facts and circumstances:

a. That the said Bernard W. Smith was duly enlisted as a soldier in the service of the United States on May 2, 1942, to serve for the duration of the war and six (6) months.

b. That on July 11, 1944, at Fawford, Essex, England, Bernard W. Smith forcibly and feloniously, against her will, had carnal knowledge of Sheila W. Dale and, with intent to commit a felony, viz, rape, committed an assault upon Miriam F. Cullum.

c. That the said Bernard W. Smith was duly arraigned for said offenses before a general court-martial, convened by Special Orders Number 195, dated 9 August 1944, Headquarters, VIII Fighter Command, AAF Station F-341, was convicted thereof by the said court and sentenced thereby to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life, which sentence was duly approved on September 20, 1944, by the officer ordering the court as required by Article of War 46. The record of trial was duly examined by the Board of Review, Branch Office of The Judge Advocate General with the European Theater of Operations and found to be legally sufficient to support the findings and sentence, which opinion was concurred in by the Assistant Judge Advocate General, European Theater of Operations, who authorized the promulgation of an order executing the sentence, all as required by Article of War 50½. On March 26, 1946, by order of the Secretary of War, petitioner's sentence was commuted to sixteen (16) years.

III. Respondent denies that he has any knowledge or information sufficient to form a belief with respect to the allegations contained in paragraph 8 of the petition.

IV. As to any alleged errors committed at the trial in respect of the admission or exclusion of testimony, the weight and sufficiency of the evidence, any conflicts in the testimony, the credibility of the witnesses and the conduct of court or counsel, respondent avers that these are matters which this court on habeas corpus, under the law, may not inquire into. Subject to this objection, respondent makes the averments contained in paragraphs V, VI, VII, VIII, IX, X and XI hereof.

V. Respondent denies the allegations contained in paragraphs 9, I(a), 9, I(b), 9, I(c), 9, I(d), 9, I(e), 9, I(f) and 9, II of the petition.

VI. Respondent denies the allegations contained in paragraph 9, III of the petition and alleges that Lieutenant Todd did not conduct the preliminary investigation which was conducted by agents of the Criminal Investigation Division.

12 VII. Respondent denies the allegations contained in paragraph 9, IV of the petition and alleges that a pre-trial investigation was regularly, impartially, competently and completely conducted, complying in all respects with the pertinent provisions of Article of War 70; that petitioner was confronted with the witnesses against him, was afforded the opportunity of cross-examination and was allowed to call witnesses on his own behalf.

VIII. Respondent denies the allegations contained in paragraph 9, V of the petition and alleges that the petitioner was ably and competently defended by the regularly appointed defense counsel and assistant defense counsel as well as by special counsel of his own choice, a lawyer with ten years' experience.

IX. Respondent denies the allegations contained in paragraphs 9, VI(a), 9, VI(b), 9, VI(c), 9, VI(d), 9, VII(a), 9, VII(b) and 9, VII (c) of the petition.

X. Respondent denies the allegations contained in paragraph 9, VIII of the petition and alleges that all of the elements constituting the offense of rape were proven by the prosecution including penetration, force, and want of consent on the part of the complainant Sheila W. Dale.

XII. Respondent denies the allegations contained in paragraphs 9, IX, 9, X, 9, XI, 9, XII, and 9, XIII of the petition and affirmatively alleges that the sentence which petitioner is now serving in the United States Penitentiary, Lewisburg, Pennsylvania is lawful and valid; that the court-martial which tried and convicted the petitioner was duly and lawfully constituted and had jurisdiction over the petitioner as the accused and over the subject matter of said cause; the conduct of said trial was regular and lawful and none of the constitutional rights of petitioner were violated during or in connection with the said trial.

WHEREFORE, your respondent respectfully prays that the petition in this proceeding be dismissed at petitioner's costs.

DATED January 28, 1947.

WILLIAM H. HYATT
Warden, United States Penitentiary
Lewisburg, Pennsylvania
By: ARTHUR A. MAGUIRE

13

United States of America
Middle District of Pennsylvania ss.:

W. H. Hiatt, Warden, being duly sworn according to law deposes and says that the facts set forth in the foregoing Response are true and correct to the best of his knowledge, information and belief.

W. H. Hiatt, Warden

Sworn and subscribed to before me this 28th day of January, 1947.

J. E. Thomas
Associate Warden—Authorized by the Act of February 11, 1938, to administer oath.

(SEAL)

14 In the District Court of the United States
For the Middle District of Pennsylvania

(Title Omitted)

Order of Court to Produce Petitioner—Feb. 4, 1947

Now, to wit, February 4, 1947, William H. Hiatt, Warden, United States Penitentiary, Lewisburg, Pennsylvania, is hereby ordered to produce Bernard W. Smith, petitioner, for hearing on the Petition and Response to be held on February 11, 1947, 10:00 o'clock A. M., at Lewisburg, Penna.

Frederick V. Follmer
United States District Judge

15 United States District Court in and for the Middle District of Pennsylvania.

In the Matter of
Application for Writ of Habeas Corpus

Bernard W. Smith
vs.
William H. Hiatt, Warden

Transcript of Evidence—February 11, 1947

Cause came on to be heard before Hon. Frederick V. Follmer, District Judge, at Lewisburg, Pennsylvania, on February 11th, 1947.

APPEARANCES:

Daniel F. Matthews, Esq., Syracuse, New York, for the Petitioner.

Major Thayer Chapman, Judge Advocate General's Office, Washington, D. C.

John M. Bain, Reporter, Northumberland, Penna.

16 By Mr. MATTHEWS. Inadvertently, your Honor, I have not complied with the rules as regarding local Counsel. May I be permitted to proceed with the understanding that I provide Local Counsel?

By the COURT. That is all right.

By Mr. MATTHEWS. We desire to ask, your Honor, if the Government has offered a certified copy of the trial?

By Major CHAPMAN. A certified copy will be offered.

BERNARD W. SMITH, the Petitioner, called and sworn on his own behalf, on direct and cross examination testified as follows:

By the COURT. It might be well to have an understanding as to the jurisdiction of the Court. We are not concerned with the guilt or the innocence of this Defendant, but we are interested in the question of whether or not he was deprived of any of his constitutional rights.

By Mr. MATTHEWS: If it please the Court, I have a rather labored brief on the facts, as well as the law and in accordance with the petition, which I previously had issued, and the answer which was filed—there are some ques-
17 tions which I will have to dispute by evidence. It is our contention that as a matter of law the Court has jurisdiction on several grounds. The first ground—it is all based on due process of law as set forth in the Constitution.

In the first instance it is our contention that Lieutenant Todd was the original investigator in this case, or one of the original investigators; that subsequently he was appointed a "Thorough and impartial investigator". We contend that the investigation was neither through nor was it impartial. I want to show by some evidence this morning that there was and had been trouble between Lieutenant Todd and this particular soldier previously; I want to show that certain witnesses, who were of vital importance, were not called which rendered the "thorough and impartial investigation" which may have been so named but was not so in fact. I want to show that when he was first interviewed he was not

advised of his rights under the Articles of War. I want to show in addition to that, that there were many errors of law in the course of the trial which were fundamental and which deprived him of his rights and that, as a result of the accumulation of these errors he was in fact denied due process of law. I want to show that the verdict was grossly against the weight of the evidence. I want to show that the reviewing authorities who reviewed this case erred in that they started from a presumption that the Defendant was guilty and then worked backwards seeking to justify the conclusion thus reached.

I have set forth a number of other points in my brief all of which go to the law to give the Court jurisdiction. That is my broad contention. I don't intend to elicit very much evidence.

18 By the Court. Go ahead.

By Mr. Matthews.

Q. You are the Defendant in this case and presently incarcerated in the Lewisburg Penitentiary?

A. Yes, sir.

Q. Your name is Bernard W. Smith?

A. Yes, sir.

Q. Now, you were in England?

A. Yes, sir.

Q. Did you know Lieutenant Todd prior to the time of the episode which resulted in your present conviction?

A. Yes; I was called before him once before that.

Q. Will you state the facts in connection with your previous contacts with Lieutenant Todd?

By Major Chapman. Objected to as irrelevant and immaterial and having no bearing on this matter whatsoever.

By the Court. What is the purpose?

By Mr. Matthews. I want to show, your Honor, that there was actual prejudice on the part of Lieutenant Todd. I want to show that Lieutenant Todd was not only one of the original investigators, but that Lieutenant Todd made statements to this Defendant previously that showed animosity, and that before this case appeared before

19 Lieutenant Todd there was prejudice which would affect his activities as a through and impartial investigating officer.

By the Court. I think we might be interested in going into what happened; as far as any conclusions that this witness might draw.

By Mr. Matthews. I intend to restrict my questions to telling what happened, your Honor.

By the Court. I will overrule the objection and note a exception for the Respondent.

By Mr. Matthews.

Q. Will you state just what happened between yourself and Lieutenant Todd, a short time prior to July 11th, 1944?

A. Some three months previous I was called before Lieutenant Todd. He told me at that time he was investigating the theft of some Army funds and that I was a suspect, and at that time he informed me of my rights and said he wished to ask me a few questions. There was another Lieutenant present. He asked me several questions in connection with this money which I flatly denied.

Q. By that you mean that you had no knowledge of any theft?

A. No, sir, I had no knowledge until that that any money had been taken from the Commanding Officer. He asked me several questions and they kept getting stronger and stronger and I flatly denied it, and he told me flatly to my face that he felt certain that I was the man who had taken the money and he said that while he did not have the proof that he would get the proof, and it became a very heated argument—

By Major Chapman. Objected to, your Honor.

By the Court. Strike it out. State what was said.

A. I informed Lieutenant Todd that if he had any satisfaction that I had committed any offense what he should do was to charge me with it and have the Commanding Officer determine whether I should be tried. He said "I have no evidence at this time that you have taken this money except my own belief and in the event I do get this evidence I will see that you are fully prosecented for it" and he warned me at that time that I had better walk the straight and narrow or I would get myself into deep water. That was the substance of the conversation as near as I can remember it.

Q. Did Lieutenant Todd say to you in words, or in substance, that he believed that you were the guilty party at that time?

A. Yes, sir.

Q. Did he further require you to account for any money you had on your person, or any place, at that time?

By Major Chapman. If the Court please we object to the manner of that question.

By Mr. MATTHEWS. I am trying to refresh his recollection as to the facts he has previously given me.

21 By Major CHAPMAN. If the Court please, I move to strike out this testimony by Counsel.

By Mr. MATTHEWS. I am attempting to refresh the witness's recollection of a previous statement to me.

By the COURT. Go ahead with the witness.

By Mr. MATTHEWS.

Q. Was anything said during that conversation concerning any money that you had?

A. Yes, sir, he asked me how much I had drawn on the previous pay day and he asked me how much money I had, and whether I had won any in gambling, and particularly how much money I had expended since pay day, and I accounted for all that.

Q. Now, do you remember July 17th, 1944?

A. Yes, sir, I do.

Q. What happened on that day? Were you summoned to go somewhere; did there come a time when you had a conversation with Lieutenant Todd concerning the case at Bar?

A. I am confused with the dates; I believe it was the 18th.

Q. On that day did there come a time when someone directed you to appear at a certain place?

A. Yes, sir.

Q. Who directed you to so appear?

A. My First Sergeant came to my Barracks about 3:00 o'clock in the afternoon and directed me to report to

22 the Commanding Officer in the Orderly Room, who was Captain MacGregor.

Q. Did you report?

A. Yes, sir.

Q. Were you directed to do something else?

A. Yes, sir. Captain MacGregor told me that he had been ordered by an officer on the Staff to take me to Lieutenant Todd's office, that they wanted to see me up there.

Q. Where was Lieutenant Todd's office?

A. A distance of approximately a quarter, or maybe a half, a mile.

Q. Where was it located?

A. At the Guard House.

Q. Did you go there with Captain MacGregor?

A. Yes, sir.

Q. When you went there with Captain MacGregor did you enter Lieutenant Todd's office?

A. No, sir; as we entered the Guard House Captain MacGregor spoke to the Officer of the Guard and said he wanted to see Lieutenant Todd and I was asked to wait in the Guard Room.

Q. Subsequently were you summoned into the room?

A. Yes, sir.

Q. Who were present?

A. Lieutenant Todd, at his desk, and two British Constables, and Captain MacGregor.

Q. And were you question?

A. Yes, sir.

Q. How long were you questioned?

A. For approximately two hours.

23 Q. Was that the first time you were ever questioned in the case at Bar?

A. Yes, sir.

Q. Who did the questioning?

A. The questioning was started by Lieutenant Todd, and one of the British Constables, who was Mr. Felton, broke in on the questioning.

Q. State what you said and what Lieutenant Todd said.

A. I asked Lieutenant Todd if this was in connection with the theft in the 351 Day Room.

Q. What did he say?

A. He never answered that question. He stated I would be informed what it was all about in due time and to answer the questions that were put to me.

Q. Did you proceed to answer the questions?

A. Yes, sir; I did.

Q. And you say that questions were put by the British Constable as well as by Lieutenant Todd?

A. Yes, sir.

Q. Did Captain MacGregor participate in the questioning?

A. He might have asked a couple of questions.

Q. Did there finally come a time when any protest was made?

A. I protested at one time.

Q. State what you said and who you said it to?

A. This Constable Felton grabbed my left hand and twisted my arm and pulled it over and I was struggling with him. I was seated in a natural position with my arms folded across. Constable Felton grabbed my hand and

said "I want to see that hand". I refused and told Lieutenant Todd I didn't want this man mauling me all over and Lieutenant Todd told me to show my hand and cooperate with the Constable or he would lock me up.

Q. Did you show your hand?

A. Yes, sir.

Q. Did you have any laceration on your hand?

A. Yes, sir.

Q. Where was it?

A. At the base of the thumb.

Q. Was there more than one laceration on that hand?

A. One laceration, Sir.

Q. Is the scar on your hand at the present time?

A. Yes, sir, it is.

Q. Will you describe to the Court the nature of the cut and the extent of the cut, or laceration?

A. It was cut and bruised along with the cut; it was inflicted by a clever which was rather dull.

Q. How long was it?

A. At that time it was practically an inch to an inch and a half long.

Q. Was the cut straight?

A. Yes, sir.

Q. Does the scar reveal the cut at the present time?

A. Yes, sir.

Q. Was there any cut on the opposite side of your thumb?

A. No, sir, none whatsoever.

Q. Now, at the time the Constable twisted your
25 hand, did Lieutenant Todd say anything to you, anything further than you have testified?

A. He gave me direct orders to answer the questions and cooperate with the British Constables; he said "I have had trouble with you before, Smith, and I don't intend to have any in this case" and he said "If you don't want to cooperate I will lock you up in the Guard House."

Q. Was Captain MacGregor there?

A. Yes, sir.

Q. Did you say anything to Captain MacGregor?

A. Yes, sir; I protested that I had not been informed of my rights and that this questioning was entirely out of order and that I had been called in previously on this matter and that I had answered the questions at that time.

Q. What did Captain MacGregor say?

A. Captain MacGregor directed me to cooperate with Lieutenant Todd

Q. Did there come a time, subsequently, that evening, when you were directed to stand in a line up?

A. Yes, sir.

Q. Where did the line up take place?

A. Right in front of the Guard House.

Q. About what time did it take place?

A. Approximately 7:00 o'clock in the evening.

Q. Up to that time had you been advised of any crime that was being investigated?

A. No, sir.

Q. Had you been informed that you were implicated in any way in a violation of the Military Law whatsoever?

26

A. No, sir.

Q. Now, will you go on and describe what happened in the line-up; who were present when you were brought out of the Guard House?

A. There were the British Constables, Felton and another one, and Lieutenant Todd, and I believe Captain MacGregor was there, and I believe the Adjutant of the Station was there and there were two or three men there in civilian clothes whom I later determined were from the C. I. D. Later, after the line-up, I learned they were C. I. D. men.

Q. Were you put in the line-up?

A. I was told to take a place in the line among some fifteen men. One of the men in civilian clothes directed me to take a place in the line.

Q. Did you?

A. Yes, sir.

Q. Which way were you facing?

A. Facing the Guard House.

Q. Did there come a time when you saw the girls or either of the girls, or both of them?

By Major CHAPMAN. What girls?

By Mr. MATTHEWS. The two Complainants.

A. Yes, sir.

Q. Did they come out one at a time?

27

A. Yes, sir.

Q. Now, where were the girls and where did they come from when you first saw them?

A. We were given an "about face" and these girls were brought out and I didn't see either of the girls until they came up in front of the line up.

Q. You mean to say you were standing there first facel away from the Guard House?

A. No, sir, we were facing the Guard House when I was told to take my place and were given a command "about face" and we stood at parade rest.

Q. Previously you had been facing the Guard House?

A. Yes, sir.

Q. Where did the girls come from?

A. There was a short hallway and Lieutenant Todd's office was off to the right. There were two windows facing out of Lieutenant Todd's office in the direction the line up was being conducted.

Q. How did those windows swing?

A. They were closed at the bottom, and I would say roughly about five feet from the floor they had a transom that swung out and this transom had a bar on it so it opened parallel.

Q. Was it a transom or part of the window?

A. It was part of the window built in; that would open.

Q. The window swung out from the top rather than swung out from the bottom?

A. Yes, sir.

Q. Could anyone standing inside of the room see out through that window?

28 By Major Chapman. Objected to as asking for a conclusion.

By Mr. Matthews.

Q. Do you know?

A. Yes, sir.

Q. You say the two girls were in this office; do you know who was in there with them?

A. No, sir.

Q. When the girls came out—will you describe what happened when the first girl came out?

A. I was standing in approximately the middle of these fifteen men in ranks at parade rest and I seen this first girl come out and walk over to a man in civilian clothes standing off to the left of me as I was facing and a C. I. D. standing to the rear of me, and she walked to this man and he directed her to pass down the line and point out any one she recognized. He also directed her to walk all of the way to the end of the line and on her way back to pick out whoever she identified.

Q. Which girl was that?

A. I don't remember which one came out first.

Q. What happened?

A. This girl turned around—I am rather confused on that—I can't tell about both of them; I would not want to state

it was the first girl. This girl turned around; I think it was the Dale girl; she walked over immediately to me and put her hand on my shoulder and said "This is the man". The C. I. D. directed her to walk down the line and make certain and she did and came back and said "I am certain".

29 Q. What about the other girl?

A. When the Cullom girl came out—

Q. Did you hear anything said between the two girls?

A. No, sir. She walked up to the C. I. D. man and he directed her the same as the Dale girl and she turned around and covered her face up and the C. I. D. asked if she had identified anybody and she said yes and he helped her over to where I was standing, and another C. I. D. man had not taken his hand from my shoulder and it was still on my shoulder and he asked me if I wanted to change my position in the line and I said "No".

Q. You mean this C. I. D. man was talking to you at the time this girl was walking from the Guard House to the line-up?

A. Yes, sir.

Q. How far was she away from you at the time, in feet?

A. At the most it would be ten feet, approximately.

Q. Did that happen with both girls or just with the one girl, regarding the talking to you?

A. Only the Cullom girl I believe he was talking—

Q. Now, do you know whether the girls, just prior to the line-up, were in the room concerning which you have just described the window?

A. I didn't know at the time but from the testimony at the trial I learned—

By Major CHAPMAN. Objected to.

By Mr. MATTHEWS. All right.

30 Q. Was there any conversation between you and the C. I. D. man regarding changing of position in the line-up?

A. The C. I. D. man asked me if I wanted to change my position in the line up after the first girl came out and went back in and at that time the other girl was on her way out. I told the C. I. D. man "There is no use in my trying to change my position in the line now because she would see me any way". She was within ten feet of me at that time.

Q. After the line-up were you called before Lieutenant Todd again?

leve at present the C. I. D. men were not there but they came in.

Q. What happened on that occasion?

A. The C. I. D. men asked me if I would make a statement that they had identified me. I said I would be willing to make a statement as to who or I was on the night in question and that was all. I had a reason to remember where I was on that evening. After quite some conversation he made out a statement for me to sign.

Q. Who made out the statement?

A. I believe the C. I. man did.

Q. What was said?

A. I read the statement over and it was merely my movements I believe on the 11th of July, 1944, and I signed it.

Q. The statement you signed was a statement as to where you had been, etc., and denying the crime; is that right?

A. That is true, Sir.

Q. Now, as to admitting the allegations, what did Lieutenant Todd say to you on that occasion, if anything; did he say anything about wanting to help you?

A. He told me to cooperate with the C. I. D. people and tell them everything I possibly could and that all of the facts of the case would be thoroughly and impartially investigated and if I cooperated with them they would cooperate with me.

Q. Did you have any controversy, or any harsh words, with Lieutenant Todd on that occasion?

A. I referred to the line-up as not being conducted fairly.

Q. Is that as strong as you put it?

A. I don't recollect now, Sir.

Q. Was anything said about both girls identifying you and not once was anything said about a quick trial or a lesser sentence?

A. No, sir, I don't believe there was.

Q. Up to that time was anything said concerning Article of War No. 24, concerning compulsory self incrimination?

A. No, sir, the C. I. D. man was the first man to warn me of my rights when I signed the statement.

Q. Subsequently there was an investigation under Article of War 70?

A. Yes, sir.

Q. Who conducted that investigation?

A. Lieutenant Todd

Q. He was a "thorough and impartial" investigator?

A. Yes, sir.

Q. Now, subsequently did you have any conversation with Lieutenant Todd with regard to a Mrs. Kerry?

A. Yes, sir.

32 Q. Will you state what you said to him and what he said to you?

A. They had been with the Manning Tree Constabulary; they had interviewed these prosecutors in the case.

Q. By that you mean the Daly girl and the Cullum girl?

A. Yes, sir, they went to see both of them but they didn't see both of them that day. They found the Dale girl that day. Lieutenant Todd took me over there. After we got outside in the Jeep he asked me if I was satisfied about talking to these girls. He was rather fair and so he said you have one other witness here a Mrs. Kerry, she lives in Brantham. He asked me if I wanted to see her. I didn't know exactly whether I did or not. I said I would let him know. He said "You said this Mrs. Kerry cannot identify you, she has never seen you; so if you go there and talk to this woman she will know what you look like so my advice to you would be to wait until it comes up, and if she can't identify you it will be a point for you.

Q. Subsequently, at the trial, was Mrs. Kerry mentioned?

A. Mrs. Kerry was mentioned repeatedly throughout the trial.

Q. As a matter of fact she accompanied the Cullum girl for some considerable time on the night of the alleged attack?

A. Yes, sir.

Q. Was Mrs. Kerry called on the trial?

A. No, sir, she was not.

Q. She was not a witness?

A. She was not a witness.

Q. Now, will you tell the Court what happened with regard to some statement or other of Mrs. Kerry's at the trial?

33 A. The trial Judge Advocate tried to enter a statement from Mrs. Kerry.

Q. That is Captain McNeill?

A. Yes, sir, Captain McNeill.

By Major CHAPMAN. I must object to this line of evidence because the record will speak for itself and I don't think we should go outside of the record and ask this witness to tell what happened two and a half years afterward.

By the COURT. The objection is sustained.

By Mr. Matthews. According to one of the decisions you have a right to go outside of the record in order to bring out the true facts. I would like to advise the Court that what I want to bring out goes to the merits of this whole controversy; if it is not included in the record and it should have been included in the record we contend the record is not complete.

By the Court. Have you any authorities on that. My understanding is that a record speaks for itself.

34 By Mr. Matthews. Dorsey vs. Gill, 148 Fed. 2, 857-867, is a case in point.

By the Court. Do you propose to contradict the record?

By Mr. Matthews. To that extent, yes, sir.

By Major Chapman. The Government's position is that this is a record of a trial before a duly constituted Court created by Federal Statute and there is a presumption of regularity which certainly cannot be rebutted by this witness. If there is anything wrong with this record it might only be attacked by possibly the reporter who took the record by showing his notes there were not correctly transcribed in here but certainly not at this stage of the proceedings can a witness be allowed to get up and testify to what took place on that trial and what was in the record or should be in the record. Certainly the record carries a presumption of regularity. It is a special type of court created by the Constitution which gives Congress the right

35 to make rules and regulations. They have formulated Articles of War which set up a certain type of court. Certainly this witness cannot impinge the regularity of this record. I certainly object to the testimony of this witness who attempts to attack this record.

By the Court. Do you take the position you cannot go beyond the record for any purpose?

By Major Chapman. It is difficult for me to say, your Honor, because I don't know what Mr. Matthews is bringing out. I am bound by this record; the Court is bound by this record. This point I would like very much to bring out. The Court is well aware of the fact that when the losing party prepares his case on appeal it is examined. The Appellate Court, in this instance is a Board of Review. They accept the record as containing all of the evidence pertaining to that appeal and under the army procedure we have a system of authentication which is very similar to the civil practice. If there is any objection to the record in civil cases you offer your objections. In this case the record

contains, at the close of the testimony, and after the sentence has been pronounced an Authentication which reads as follows: "Authentication" and it is signed by Captain Harley J. McNeal, Trial Judge Advocate, and by the
36 President of the Court, Colonel Donald P. Groul, and it is indicated that the Defense Counsel examined the record and authentication and it was initialed by Defendant's Counsel which corresponds to our civil practice.

By the Court. That was done here?

By Major Chapman. Yes, your Honor, we have the original record.

If your Honor cares for this now I will offer the certified copy of the authentication of the record now. I intend to offer it as part of the Government's case.

(The record is handed to the Court and his attention called to page 160.)

By the Court. Mr. Matthews, do you think you should make an effort to examine on the particular part of the record that is incomplete?

By Mr. Matthews. I will do that, I will attempt to comply with your request.

We contend a statement was offered in the course of the trial by the prosecution, by a Mrs. Kerry wherein Mrs. Curry said "If I was in Court I would not identify him as the man who walked along the road with Mary Cullen. Thereupon an objection was made, and the statement, after it had been read, was finally stricken from the record, and we contend that that was suppressing testimony which in effect did not get into the record and which was
37 highly prejudicial to the conceded facts up to this point, that Mrs. Kerry never saw the man sufficiently on the night she walked with Mary Cullum to be certain. I don't know where the Court Reporter is. While Counsel argues that in civil cases you stipulate the record, here was a case, in so far as we know, where the lawyer was a layman. We never consented to that record; we never had a chance to argue on appeal. This was assigned Counsel and I don't know if he even was a lawyer.

By Major Chapman. The lawyer was Smith's own choice. If we opened the record to any such attack as this we might as well burn the record or throw it away. I am most certainly objecting.

By the Court. We will sustain the objection and note an exception for the Petitioner.

By Mr. Matthews.

Q. When you were held for trial was a lawyer assigned to you?

A. By the Courts Martial.

Q. Had he authority to?

A. Yes, sir.

Q. Who was that lawyer?

A. Captain William Kapelman.

Q. And did he try the case?

A. Yes, sir.

Q. Did he ask all of the questions?

38 A. Yes, sir.

Q. Now, was there another Counsel in that case?

A. There were two other Counsel.

Q. Who were they?

A. Lieutenant William J. Crollard, Jr. and Lt. Lieberman, appointed by the Court.

Q. Now, in regard to Lieutenant Lieberman, did you request him to be Counsel in that case?

A. No, sir, I did not.

Q. Will your state the facts and circumstances with him being present?

A. The night before the trial I was taken from Headquarters to consult with my Counsel and at that time he introduced a second lieutenant to me and he told me that man had been assigned to Headquarters and he was sent down to observe the case. Lieutenant Lieberman told me he had been an attorney for a number of years but was not very familiar with Military Law and was trying to find his way around.

Q. Did he take any part in the trial?

A. No part whatsoever that I had any knowledge of.

Q. Did he ask any questions?

A. None whatsoever.

Q. What about Lieutenant Crollard?

A. Lieutenant Crollard kept the notes of the trial.

Q. How did he get into it?

A. I didn't know if Lieutenant Crollard—because he was an officer from our station, and he had been Trial Judge Advocate on the Staff for a considerable

39 length of time and had a very good record.

Q. Was he a lawyer?

A. He didn't state; I don't believe he was.

Q. Counsel Lieberman is not mentioned in the record; you say he was there?

By Major CHAPMAN. Is that a statement or a question? May I direct your attention to the record on page three wherein it is shown that he was not appointed by the Court; he was requested by the accused at the time of the trial.

By Mr. MATTHEWS.

Q. Then, as I understand, Captain William Kapelman and First Lieutenant William M. Crollard were appointed by the Court?

A. Yes, sir.

Q. And Lieberman was there at your request?

A. No, sir, he was not there at my request. I might have requested him but I was requested by Captain Kapelman to let him hear the case.

Q. Do you know wheher Lieutenant Crollard was a lawyer?

A. I don't know, sir; I believe he was.

By Mr. MATTHEWS. I want to say. The facts in this case show that there was an attempted rape and there was a raping. As I see the procedure they started out by saying it happened at the same time and the same place and therefore it follows that it was the same man. The evidence was taken from both cases. This Mrs. Kerry—a statement was offered in evidence and was read and that statement was highly prejudicial in that she said "If I were in Court I would identify him". When the statement was completely deleted from the record—it was not only ruled out but it was completely deleted from the record. What I want to show at this phase of the case is what happened at that time. I take the position that it should have been in the record, and, further, that the accumulation of these errors resulted in the failure of due process of law.

By Mr. MAGUIRE. Your contention is that the evidence you are attempting to introduce now was improperly stricken from the record.

By Mr. MATTHEWS. Yes, sir, and was highly prejudicial. The Military Court had it before them; the Reviewing authority did not have it before them.

By Mr. MAGUIRE. The Military Court had it before it, and before it considered the evidence in the case it was stricken from the record, and that you contend was improper and highly prejudicial?

By Mr. MATTHEWS. That is correct.

By Mr. MAGUIRE. How did it hurt your client?

By Mr. MATTHEWS. The Court heard it and it was
41 there. It is the same as when you mention insurance in the trial of a civil case. It is my contention, under our theory, that I have a right to point out the jurisdictional errors. I have the right to point out the accumulation of miscellaneous errors; I have a right to point out that this verdict was against the weight of the evidence and the conclusion of law was erroneous and all of these matters are reviewable on Habeas Corpus. I have a right to go beyond the record to see what happened; if I can show substantial error and what it was, that this man did not obtain due process of law. If the Court had before it evidence which does not appear in the record and which is as prejudicial as we contend it to be, it is something the Court can determine whether it is one error or adds up to a total of errors.

(RECESS.)

By Mr. MATTHEWS.

Q. Did something happen in the course of this trial in connection with a radio log?

A. Yes, sir.

Q. Do you know whether there was anyone in the Court Room with a radio log.

A. Yes, sir.

Q. Do you know whether or not he had the time when the radio went off of the air?

A. He had the time of the relay of the broadcast.

Q. He had that time, the time that station went off of the air?

A. Yes, sir.

Q. Can you tell us what happened in regard to that witness; as to whether he was sworn or whether that evidence was presented.

42 By Major CHAPMAN. Objected to on the ground that the record speaks for itself.

By the COURT. Objection is sustained, exception noted.

By Mr. MATTHEWS.

Q. Did you ever make a previous application for a Writ of Habeas Corpus?

A. No, sir.

Q. Did you commit the offense you are accused of?

A. No, sir.

By Major CHAPMAN. Objected to as being irrelevant, incompetent and immaterial.

By the COURT. Objection is sustained.

By Mr. MATTHEWS. I would like to offer in evidence the scar on the Defendant's hand and have the Court examine it, for the purpose of physically showing that the scar resulted from a cut. My reason for making this offer is that at no point in the record did the girl who testified that she bit this man state anywhere whether or not this cut was deep; whether it punctured or wounded, or whether any blood was drawn, or with what severity this bite took place; and I would like to offer that scar in evidence and have the Court examine it for the purpose of ascertaining the dimensions, the size. There is no description of this cut in the record made by medical evidence whatsoever. The only description of this cut is one by Constable Felton; further it is a very important factor because it appears from the evidence that Constable Felton first saw this scar at an examination which took place about 7:30 in the evening of the day testified to by the witness, and that the complaining witness made a statement, which appears in one of the exhibits, wherein she said "I bit his right hand" whereas as a matter of fact the scar is on the left hand. With that declaration I would like to offer the scar in evidence and call it to the Court's attention.

By Major CHAPMAN. I would certainly object to the admission of any such testimony. Such an offer does not attack the jurisdiction of the Court and at this time it is too remote; and, further, it is an attempt to assert that the Trial Court gave full credence and weight to the evidence concerning the cut, but there is no evidence that the Court paid any attention to it in its deliberations. It very definitely goes to the weight and sufficiency of the evidence over which this Court has no jurisdiction on a hearing on a Writ of Habeas Corpus.

By Mr. MATTHEWS. The Reviewing Authority clearly states that Constable Felton identified this man by the marks of the bite. The evidence shows that this girl said she scratched the Defendant and that she bit his right hand, and that was the real means, according to Constable Felton's testimony of singling this Defendant out from all of the men. Further the Reviewing Authority specifically sets forth that cut as one of the major reasons for sustaining this conviction; that was one of the major points in sustaining this conviction, as stated by the Board of Review. It sets it forth in some detail.

By Major CHAPMAN. Your Honor has a copy of the report of the Board of Review; it is rather lengthy and it

discusses all the evidence and the reasons for the Board's opinion. If it is going to save time I have no objection to your Honor looking at the man's hand at this time.

By the Court. I don't see that it has any relevancy, but I have no objection to looking at the wound.

By Mr. Matthews. I argued to your Honor the accumulation of errors; this is just another factor that goes into the situation, that as a result of the accumulation of errors this man was denied due process of law in this trial and not having due process of law he, therefor, is unjustly convicted and the Court loses jurisdiction. If the girl said she bit the right hand and the scar appears on the left hand and the Constable stated it was the results of this bite that enabled him to identify him it appears to me that would be a very important point.

By the Court. I will have to sustain the objection and note an exception for the Defendant.

By Mr. Matthews. I would like to supplement my brief to this extent: that the Government, in their Answer, deny that Lieutenant Todd was one of the original investigators of this offense. By that I make a distinction between Article 70 where you have a fair, thorough and impartial investigation. On the bottom of page 2 it is stated "Respondent denies the allegation and alleges that Lieutenant Todd did not conduct the preliminary investigation, etc." I would like to call the attention of the Court to the statement on page 101 of the record wherein Wilfred John Felter testified as follows:

"Q. When you first question the accused what circumstances led you to question Private Smith? A. We had a number of men we interviewed in Lieutenant Todd's office and Smith was one of them." The purpose of that, if the Court please, goes to the point that a thorough, impartial investigator should not be in the case and under the statute the person subsequently appointed to make a thorough impartial investigation pursuant to the 70th Article of War.

By Major Chapman.

Q. You told us that the first time you were questioned by Lieutenant, now Captain, Todd it was with respect to your theft of some funds; is that right?

A. Yes, sir; that was three months previous; approximately three or four months before that.

Q. And the second time you were questioned by Lieutenant Todd with respect to this particular offense you

told us you were questioned for some two hours in the presence of British Constables and others; is that correct?

A. Two British Constables, my Commanding Officer and Lieutenant Todd.

Q. And at that time I think you stated you thought they were still discussing the missing money?

A. During the majority of that investigation I believed that.

Q. Didn't you then say, on direct examination, that the reason you didn't want the Constable to see your hand was because you thought it didn't have anything to do with this missing money.

A. I don't recall.

Q. What was the reason?

A. I didn't think being a part of the United States Army, that any British Civilian had any right to maul me over.

Q. During this two hour investigation did you, during all that time, believe they were questioning you with respect to the missing money, the same matter that Capain Todd had questioned you about two or three months previously?

A. It became very questionable in my mind what it was about.

Q. What did they ask you?

A. They asked me where I had been on a certain night.

Q. What night?

A. July 11th I believe.

Q. Did you think where you were on the night of July 11th had any bearing on the money missing four months prior to that time?

A. It was a possibility it could have had.

Q. Did they question you with respect to any alleged attack on some girls?

47 A. It was not mentioned until nearly the end of this investigation.

Q. At the end you did know you were being questioned on an alleged attack on a couple of girls on the night of July 11th?

A. Just before I left this room Lieutenant Todd told me "I might as well tell you what this is about. A couple of girls were molested and Constable Felton seems to think you were responsible for it," and he asked me if I would consent to appear in a line-up.

Q. Did you so consent?

A. Yes, I did.

Q. When do you fix the time of the line-up with respect to the time you were first questioned in Lieutenant Todd's office by the British Constable in the presence of Lieutenant Todd and your Commanding Officer?

A. I know definitely what time the line-up was. It was either 7:00 or 7:30, between there.

Q. On what date?

A. I believe it was on the 18th.

Q. That is the date you were questioned in Lieutenant Todd's office by the British Constable?

A. Yes; it was the same day; I would not want to be definite about the date.

Q. You told Lieutenant Todd about it the same day?

A. It was the same day but I am not testifying to the date.

Q. It was the same day?

A. Yes, sir.

Q. Later on in the day?

48 A. Yes, sir.

Q. With respect to this Mrs. Kerry, did you at any time request your attorneys to subpoena her for the trial?

A. Yes, sir, I did.

Q. Whom did you ask?

A. Captain Lieberman; I asked him in the Court Room.

Q. You didn't ask him prior to the trial, did you?

A. I can't answer that question without an explanation.

Q. Did you at any time request the Judge Advocate, or his Assistant to subpoena Mrs. Kerry?

A. Not in open Court I don't believe it was asked.

Q. Did you make any request to the President of the Court or any member of the Court, for the presence of Mrs. Kerry at the trial?

A. Only my defense counsel.

Q. How do you mean that?

A. I asked my defense counsel for her presence as a defense witness during the course of the trial.

Q. Did you request the Court itself to have Mrs. Kerry produced as a witness?

A. No, sir.

Q. Did you ask the Judge Advocate, or his Assistant, at that time, to produce Mrs. Kerry?

A. No, sir; I didn't realize I had that privilege.

By Mr. Matthews.

Q. The Major, for the Government, just asked you whether or not you were questioned for two hours and as to whether or not during that period of time you thought

they were talking about an episode that happened several months previously when the money was missing?

A. Yes, sir.

Q. Will you tell the Court what you were interrogated about for the hour or two hours: state the general line of the questions.

A. I was asked what time I left the Station, where I went, if I was in any Pubs or Saloons, as they call them and how much beer I had drunk and what different times I was in these particular places and what time I had started back to the Station, and what time I reached the Station, and whom I came back with, if anybody, and what I did after I arrived on the Station.

Q. During all that phase of the conversation nothing was mentioned about girls?

A. There was no reference to girls until near the end of that investigation or interrogation.

Q. Did you say you thought it was a part of the original proceeding that had gone on before?

A. Yes, sir; I thought they were trying to check on these Pubs and check on what money I had spent.

Q. That is why you answered my question the way you did?

A. Yes, sir.

Q. In regard to the line-up, what did Lieutenant Todd say to you concerning your standing in a line-up?

A. He asked me if I would consent to stand in a line-up and I said I didn't see any reason for consenting to stand in a line-up as I had committed no offence and he said I would either go out there or "I could confine you in the Guard House and have them look at you without anybody else being present."

Q. In regard to Felton grabbing your hand; was there some commotion and confusion at that time in regard to that operation?

A. When he reached across me and grabbed my hand I resented it and I let him know I resented it; he was trying to get my hand away from me.

By Mr. MATTHEWS. If the Court please, I again request all of the proceedings in this case, the full and impartial investigation, the record of the trial, the Reviewing Authorities and the Review of the Judge Advocate General, and the Opinion of the Board of Review if these are admitted in evidence for the purpose of the Court's examination, we rest.

By Major CHAPMAN. At this time, if I have not done so, I will offer the duly authenticated copies of the record of the trial before the General Court Martial, the various Reviews, etc., including the report of the pre-trial investigation pursuant to Article 70 and any like papers or photostatic copies of any papers.

51 CAPTAIN ALAN B. TODD, called and sworn on the part of the Government, on direct and cross-examination testified as follows:

By Major CHAPMAN.

Q. You are an Officer in the United States Army?

A. I am.

Q. Were you such in July, 1944?

A. Yes, sir, I was.

Q. What was your duty Station?

A. A. F. Station No. 357, near Ipswich, England.

Q. Are you the Lieutenant Todd mentioned in this proceeding?

A. I am.

Q. Under what circumstances did you first have any occasion to interrogate Private Smith?

A. I was on duty as Provost Marshal of the Field and the first I knew about any such happening was one day about the 16th or 17th of July, two British Constables came to my office and said that there were two British girls that had been molested; that they had a description of the man and an investigation had been started by the C. I. D., and they were on the Station to see if they could aid in the investigation in any way. They gave me a description of the man as given to them by the girls.

Q. Did you think you recognized someone of that description as being stationed at your Base?

A. Not immediately, no.

Q. By what process did you arrive at the interrogation of Private Smith?

A. I told the British Constables they would have to have more than they had given me. They gave me the

52 nickname of a soldier they knew was in that vicinity. They went over the list until finally they got the man they referred to. They then inquired of this man of all of the men of our Base that he had seen in that vicinity. He referred to several people and he referred to one as a "fellow by the name of Smith." We went through our rosters again and found a Private Smith, and having had a prior investigation in which we had had Private Smith

on question, we called him in again, as it seemed to us he fit the description as they stated it.

Q. Did you ask for Smith's presence at the Provost Marshal's office on some occasion when the British Constables were present?

A. That is the occasion, the 16th or 17th, the first we knew that anything of this type had happened. We interviewed several men, of whom Smith was one, at the request of the British Constabulary.

Q. Who did most of the interrogating?

A. The British Police did some; I did some.

Q. Subsequent to that interrogation was there an arrangement made for a so-called "line-up" of a number of soldiers to see whether or not the Prosecutrixes could identify any of the men in the line-up as having been guilty of the alleged offense?

A. Yes, several days subsequent; because in the meantime I had been appointed Investigating Officer.

Q. The line-up was conducted by you in your official capacity as the Investigating Officer, pursuant to Articles of War No. 70?

A. That is correct.

Q. At any time was there a line-up at a time when you were not the Investigating Officer?

A. No, sir.

Q. Now, under Articles of War No. 70, did you have a line-up conducted?

A. I did.

Q. Will you describe, briefly, the procedure that occurred at that time?

A. We got fourteen men from my own Company, dressed all alike in their uniforms. We had Smith dressed in the same type of uniform. We had men of all sizes and shapes and heights and of all descriptions. We lined them up in front of the Guard House. Prior to calling Smith out I took his Commanding Officer into his cell and asked Smith if he had any objection to any type of line-up and he said he had not. I nodded to Captain MacGregor who knew what his answer was. We took Captain MacGregor along to protect his rights. Besides the Captain MacGregor we had as witnesses to the line-up, the Chaplain of the Field, the Executive Officer of the Field, and several others standing around. Prior to getting Smith we had the girls brought into a separate room of the Guard House. They had at no time seen Smith prior to the line-up.

Q. Did that room overlook the line-up?

A. Yes, sir, it did; but there were opaque panes in the window that you could not see through. I could not see out of the windows to the ground level.

Q. How tall are you?

A. Five feet seven inches.

Q. Were either of those girls taller than you?

A. They were both smaller.

54 Q. Go ahead.

A. When he said he had no objection to the line-up he was taken outside and told to take his place. One girl was brought out first by herself and there was a C. I. D. at the head of the line-up and he explained to the girl that she must walk down the line looking at all of the men and on the way back if she saw the man who was her attacker she should touch him. She did and picked out Smith. She was taken into the Guard House but did not confer with the second girl. The second girl was then taken out and she picked him out in the same manner. There was quite an emotional depression on the part of one of the girls because, as she said, she was afraid of the man. After that was over the girls were taken in hand by the British Police and taken home. There seemed to be no hesitation in their identification.

Q. Subsequently, was Smith brought into the Provost Marshal's office?

A. Smith was taken to his cell and his Captain went along with me and I asked Smith if he thought the line-up was conducted in a fair manner and he said it was, but he still protested his innocence. At no time did I threaten Smith and tell him that he had to answer questions or his right to get into the line-up or I would bring the girls into the cell. I was acting under the 24th Article of War.

Q. As a matter of fact, Captain, the accused never confessed to the commission of this offense?

A. No, sir.

Q. Prior to the time of your having been appointed Investigating Officer under Article of War No. 70, had

55 you formed any opinion in your mind as to the guilt or innocence of the accused?

A. I had not. I was perfectly of a fair mind. When I was appointed Investigating Officer I wanted to get at the truth of the matter.

Q. With respect to your investigation conducted pursuant to Article of War No. 70, what steps did you take to comply with Article No. 70?

By Mr. Matthews. Objected to, if the Court please.

By Major CHAPMAN.

Q. Just tell us what steps you took; what you did, when carrying out your duties as Investigating Officer.

A. I first of all informed Smith I was investigating the case in which he was accused and that he had the right to either make a statement or not to make a statement, and it could not be used against him. I told him there were certain witnesses I wanted to question and he had the privilege to come with me and examine them in my presence. That I would swear all those to be questioned under me.

Q. Did you in fact do that?

A. I did.

Q. Did you take the accused, Smith, with you when you went to interrogate witnesses to determine the advisability of recommending trial?

A. Every time.

Q. Did you afford him an opportunity to cross-examine those witnesses?

56 A. He had a full opportunity.

Q. Did you reduce the testimony of those witnesses to writing?

A. I did.

Q. Was the accused given an opportunity to read this testimony?

A. Yes, sir.

Q. Did he cross-examine those witnesses?

A. He did.

Q. Did he request certain witnesses called on his behalf to be interrogated by you?

A. Yes, sir.

Q. That was on the theory of an alibi?

A. Yes, sir.

Q. Did you comply with his request and call the witnesses he requested you to call?

A. I called every one of them.

Q. Did you examine them?

A. Yes, sir.

Q. Did he examine them?

A. Yes, sir.

Q. Were their statements reduced to writing?

A. They were.

Q. And as a result of the interrogation of the witnesses did you arrive at a conclusion which you furnished your Commanding Officer, the Appointing Authority, your conclusion as to whether or not he should be subjected to a General Courts-Martial?

A. I arrived at that conclusion and so recommend-
57 ed to my Commanding Officer.

Q. At the time you were interrogating various witnesses with respect to the matter did the name of a Mrs. Kerry come up?

A. Yes, the name of Mrs. Kerry did come up.

Q. Do you know what attempt, if any, was made to interrogate her, and any reason why she was not?

A. So far as from a prosecution standpoint it was not necessary. As far as from the Defense standpoint, I asked Smith if he wanted her and he said "No."

Q. You heard Smith testify as to the alleged conversation between him and you?

A. No such conversation took place.

Q. What conversation took place in regard to calling Mrs. Kerry in regard to Smith?

A. I told him she was one of the people whose name had appeared in the case.

Q. Do you know the regularly appointed Counsel by the Court?

A. Yes, sir.

Q. Do you know anything about the qualifications of the assistant, the regularly appointed assistant defense Counsel, Lieutenant Crollard?

A. Yes, sir, he is a graduate of Notre Dame Law School and admitted to practice in Washington.

Q. Do you know anything about the qualifications of Lieutenant Lieberman?

A. No, sir.

By Major CHAPMAN. At this time I offer in evi-
58 dence a duly authenticated copy of the record of Harry Lieberman on file in the office of the Adjutant General, for the purpose of disclosing his educational and professional background.

Q. With respect to yourself, will you tell me what qualifications, what special qualifications, you may have which would assist you in being an investigating officer pursuant to A. W. 70?

A. I have a B. S. Degree and an L.L.B. Degree from a Law School and admitted to practice law in New York.

Cross Examination by Mr. MATTHEWS.

Q. Now, you say this line-up took place some time after you interrogated Smith on the first day?

A. That is true; yes.

Q. This crime is alleged to have taken place on the 11th of July, 1944; is that correct?

A. Yes, sir.

Q. What was the first time you had confronted Bernard in this matter?

A. As I stated before, either the 16th or 17th of July.

Q. How long after that was the line-up conducted?

A. Approximately a week.

Q. Is that your best judgment?

A. That is my best judgment.

Q. Are you reasonably sure of this, Captain, are you reasonably sure that you were appointed the Impartial Investigator under AW 70 prior to the line up?

A. Prior to the line up; yes.

Q. Are you certain of that fact?

59 A. Yes, I am.

Q. Now, as Investigating Officer you made certain reports?

A. I did.

A. Under AW 70?

A. Yes, sir.

Q. And you took certain statements?

A. I did.

Q. Did you take a statement from Sheila Dale?

A. I did.

Q. And at the end of that statement did you sign it?

A. I think I authenticated it, she signed it.

Q. I call your attention to Exhibit B page 4 of the pre-trial Investigating Officer's report that you made, and ask you whether the following statement is true. "This is the statement of Sheila Dale. At 7:15 P. M. on Tuesday, July 18th, 1944, I attended an identification, etc. etc. and picked out a man who was brought with fourteen other men as the man who had assaulted me on July 11th, 1944. I had not seen this man from the time he had assaulted me, etc."; I ask you if that is a correct statement?

A. I cannot tell; it is not my statement.

Q. You attested that it is a true copy, that on the 18th an identification party was held?

A. I attested this is a true copy of something the Dale girl said to the Constable.

Q. She stated that on the 18th of July the identification detail was held?

A. If she so stated it is in the statement.

Q. What date were you appointed the Impartial Investigator?

60 A. I don't recall the exact date. Major, do you have the date of the appointment?

By Major Cravens. No, I don't; I have the report.

By Mr. Matthews.

Q. What sort of document is prepared when you are appointed as an Investigating Officer under AW 70?

A. There is a regular form for it or it might be done by a letter also.

Q. When is the Impartial Investigator appointed with regard to the original report on the crime?

A. After charges have been brought.

Q. Before the charges are brought a report must be made by the arresting officer, whoever he may be; is that not so?

A. You can say that is so but it doesn't necessarily mean it is true; a man can be charged by any other person not a military person.

Q. I call your attention to this document and ask you if that is the report of the C. I. D. in this case?

A. It appears to be.

Q. What date was that made?

A. The 23rd of July, 1944.

Q. In the Army there is no question that if it is dated the 23rd it is made that day?

A. I don't know; the custom is to date a thing the day you do it.

Q. As a matter of fact that is stamped as received
61 July 28, 1944?

A. It is.

Q. You want to tell this Court you were appointed a thorough and impartial investigator before that report was made.

By Mr. Chapman. This report was not submitted as a basis for his appointment as an Investigating Officer; it is not necessary to have a report filed before an appointment is made.

By the Court. Is this not a matter of argument. It seems to me you are wasting an awful lot of time.

Hearing Ended.

62 Reporter's Certificate to foregoing transcript omitted in printing.

63 *Government's Exhibit No. 1.*

Not formally identified and marked by the Reporter at the time of trial but handed to the Court. Is now identified by the Official Reporter as Government's Exhibit No. 1, and filed with the Clerk of Court at Lewisburg, Pa.

Jno. M. Bain,
Official Court Reporter.

64 UNITED STATES (Emblem) OF AMERICA
WAR DEPARTMENT

WASHINGTON, January 17, 1947

I HEREBY CERTIFY that the attached is a photostatic copy of the record of trial of Bernard W. Smith, 32286877, by a general court-martial which convened at Headquarters VIII Fighter Command, AAF Station F-157, England, 25-26 August, 1944, together with accompanying papers; official copy of General Court-Martial Orders No: 75, Headquarters VIII Fighter Command, APO 637, 11 December 1944; holding of the Board of Review dated 9 December, 1944 and first endorsement of the Assistant Judge Advocate General, dated 9 December, 1944, on file in the office of The Judge Advocate General.

THOMAS H. GREEN,
Major General,
The Judge Advocate General.

I HEREBY CERTIFY that Major General Thomas H. Green, who signed the foregoing certificate, is the Judge Advocate General of the Army, and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, ROBERT P. PATTERSON, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Deputy Administrative Assistant of said Department, at the City of Washington, this seventeenth day of January, 1947.

(SEAL)

ROBERT P. PATTERSON,
Secretary of War.
By JAMES C. COOK,
Deputy Administrative Assistant.

65 WAR DEPARTMENT
THE ADJUTANT GENERAL'S OFFICE
Washington 25, D. C.

IN REPLY REFER TO:
AGKC-R 201 Smith, Bernard W.
(8 Mar 46)

26 March 1946

In the case of General Prisoner Bernard W. Smith, ASH 32,286,877, confined at the United States Penitentiary, Lewisburg, Pennsylvania, so much of the sentence to con-

finement published in General Court-Martial Orders, No. 75, Headquarters, VIII Fighter Command, dated 11 December 1944, as is in excess of sixteen years; is, by direction of the President, remitted.

BY ORDER OF THE SECRETARY OF WAR:
Adjutant General

Copy for:
The JAG
CM 3837
279112

66 RESTRICTED

GENERAL ORDERS NUMBER 88 HEADQUARTERS VIII FIGHTER COMMAND APO 637 AAF STATION F-341
17 October 1944

I.—ASSUMPTION OF COMMAND.—1. Under the provisions of AR 600-20, and par 1, SO 281, Hq Eighth AF, 15 Oct 44, the undersigned hereby assumes command of the VIII Fighter Command, effective this date.

BENJAMIN J. WEBSTER,
Colonel, Air Corps,
Commanding.

DISTRIBUTION: "C"

67 CONFIDENTIAL

HEADQUARTERS
VIII FIGHTER COMMAND
Office of the Commanding Officer
APO 637 AAF Station F-341

IX 1600
5 Jan 1945
BOTJAG-ETO
Hq:VIII FC REG No.: 50432

N-W-2
Received
6 Jan 1945 9:55 hrs.
Board of Review
BOTJAG-ETO
11 December 1944

GENERAL COURT-MARTIAL ORDER NUMBER.....75

Before a General Court-Martial which convened at AAF Station F-157 pursuant to paragraph 1, Special Orders No. 195, Hq., VIII Fighter Command, dated 9 August 1944, was arraigned and tried:

Private Bernard W. Smith, 32286877, Headquarters Detachment, 353rd Fighter Group.

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July 1944 forcibly and feloniously against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages Station Road, Lawford, Essex.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz, rape, commit an assault upon Miriam Florence Cullum, 57 Colchester, Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.

6 Jan 1945

Record of trial examined by the Board of Review with the concurrence of the Assistant Judge Advocate General Branch Office of T AG with ETO and found legally sufficient to support the sentence.

B. FRANKLIN RITER
Chairman, Board of Review

PLEAS

To all Specifications and Charges: Not Guilty

FINDINGS

Of all Specifications and Charges: Guilty

SENTENCE

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. (One previous conviction considered).

The sentence was adjudged on 26 August 1944.

The sentence is approved, and, Article of War 50½ having been complied with, will be duly executed. The United States Penitentiary at Lewisburg, Pennsylvania, is designated as the place of confinement.
(CM ETO 3837).

By order of Colonel WEBSTER:

RICHARD X. ELLIS,
Lt. Colonel, Air Corps,
Chief of Staff.

OFFICIAL:
JOHN J. SAILORS,
Colonel, AGD,
Adjutant General.
DISTRIBUTION: (See reverse side)

68 DISTRIBUTION:
20 Cys—Judge Advocate, VIII Fighter Command.
2 Cys—Adjutant General, VIII Fighter Command.
69 1st Ind.

ECMcN:lbd

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations, 9 Dec 1944 To: Commanding General, VIII Fighter Command, APO 637, U. S. Army.

1. In the case of Private BERNARD W. SMITH (32286877), Headquarters Detachment, 353rd Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3837. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3837).

E. G. McNEIL.
Brigadier General, United States Army,
Assistant Judge Advocate General.

OUT 1600
9 Dec 1944

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

9 Dec 1944

BOARD OF REVIEW No. 1
CM ETO 3837

UNITED STATES
v.
Private BERNARD W. SMITH (32286877), Headquarters Detachment, 353rd Fighter Group

VIII Fighter Command. Trial by GCM, convened at Headquarters VIII Fighter Command, AAF Station F-157, England, 25-26 August, 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW No. 1
Riter, Sargent and Sievens, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did at Ipswich Manning Tree Road, Lawford, Essex, England, on or about 11 July 1944 forcibly and feloniously, against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages, Station Road, Lawford, Essex.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that * * * did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz, rape, commit an assault upon Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was

found guilty of both charges and their specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for five days in violation of the 61st Article of War. All of the members of the court present at the time the vote was taken concurring he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. *Charge I and Specification:* Prosecution's evidence shows that on the night of 11 July 1944, Sheila Winifred Pale, 20 years of age, of Victoria Cottages, Manning Tree, Essex, England, rode her bicycle on a public highway between Brantham and Manning Tree (R8, 10). She was returning to her home. At a point on the road near Bucks Horns in Brantham she was accosted by a white American soldier who also rode a bicycle (R9-10). He cycled by her side and asked to escort her home. His advances were rejected by the girl. When the couple reached a pathway which is a "short cut" to Manning Tree, the soldier suggested they travel the same. The pathway follows a river bank and is "very lonely". Sheila refused the suggestion and continued her travel along and over the regular road. When about 100 yards beyond the entrance to the "short cut" the soldier grasped the handle bars of the young woman's bicycle and shook it. He said, "You have got to stop here whether you like it or not". Sheila fell from her bicycle (R11). The soldier dismounted from his bicycle, dropped it and then threw Sheila's bicycle onto a wide grassy path. The girl ran, but was overtaken by the soldier who grasped her from the rear and pinned her arms about her body. He dragged her back to the spot where the bicycles were on the ground, and picked up his own bicycle and threw it aside. In this operation Sheila again freed herself and ran away. Again the soldier captured her and dragged her onto a grassy patch. She "started making excuses"; that it would spoil her clothes; that her father would come any minute and that she had to arise early the next morning (R12-13). The soldier paid no heed and removed his coat. He then threw her to the ground. When

she screamed; the soldier put his hands to her throat and said,

"if I didn't stop screaming, he would murder me" (R14).

He then pulled up her skirt. She struggled kicked her legs and endeavored with her hands to push the man away. The soldier removed her knickers from her body and then extended himself on the ground at right angles to the girl with his chest on her right leg (R14-15). He pushed her legs apart, put a hand over her mouth and applied his mouth to her private parts. His tongue entered the lips of her genitals. During this process she endeavored to sit upright but was pushed to the ground upon each effort. After two or three minutes of this perverted practice he placed himself on the girl, inserted his penis in her vagina and engaged in sexual intercourse (R15), at the conclusion of which he arose, threw the knickers to the girl and said, "You had better put these on again". At her request he secured her bicycle for her (R16). He asked to see her again.

> "I was all for it because I wanted to get away. I thought if I said I would he would let me go. He said he wanted to meet me on Thursday night at 7 o'clock. First he said at the white bridge then he said: 'No, make it the other bridge, the one near the Bucks Horns.' I said: 'I will.' He said: 'I don't believe you will.' * * * I wanted to get away and get home. I was frightened that he would start everything all over again. * * * He wanted to kiss me good night and I think he did manage to. I let him. I saw he was getting mad again, so I let him do it to get away" (R17).

When Sheila arrived home in a hysterical, distraught condition (R39,54,58) she called her mother and informed her

> "I had been attacked by a sexual maniac and that if I didn't give in to him, he would kill me" (R18).

The skirt (Pros. Ex. 1) and knickers (Pros. Ex. 2) worn by Sheila during the occurrence of the events above described were identified by her and introduced in evidence. When she arrived at her home there was a wet stain on both articles of clothing (R19). Dr. James Davidson Hendon, founder and director of the Metropolitan Police Laboratory, made on 20 July 1944 a microscopic examination of the skirt and knickers and, as prosecution's witness, testified that by the discovery in the stains of spermatozoa he concluded the stains were male seminal fluid (R42-44, 45).

Due to the absence of tails on some of the spermatozoa there was a possibility that the fluid had been in the girl's vagina and then excreted therefrom (R46).

Dr. Frederick H. E. Beckett, of Manning Tree, Essex, England, examined Sheila about 1030 am on 12 July 1944. She had bruises on her right thigh, on her left arm [illegible] and left knee and a "graze" on her left knee. They were fresh bruises. An examination of the vagina showed she was not a virgin (47-48). On 2 August he tested her for pregnancy by applying to her the prostigmine test. The result of the test indicated the strong probability that she was pregnant (R49-50).

At the time Sheila went to Dr. Beckett on the morning of 12 July he informed the British civil police of her complaint and made his examination in the presence of Police Constable Wilfred John Felton of Mistley, Essex, who thereupon commenced an investigation of the case (R48, 93).

The foregoing evidence is proof beyond reasonable doubt that Sheila was assaulted on the night of 11 July by a white American soldier who secured sexual intercourse with her without her consent and in spite of her resistence by the exertion of force and violence upon her. All of the elements of the crime of rape were established (MCM, 1928, par. 148b, p. 165; CM ETO 3910, *Hartsell*, and authorities therein cited; CM ETO 3718, *Steele*; CM ETO 4017, *Pennyfeather*).

4. *Charge II and Specification:* Evidence for the prosecution established the following facts: Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, age 19 years, left Brantham on the night of 11 July 1944, accompanied by a friend, Mrs. Kerry (R60). They walked, although Miriam had her bicycle with her which she wheeled by her side. They passed a white American soldier on a bicycle (R61, 65) who soon thereafter turned, followed after them and accosted the women. He asked if he could see them home. Mrs. Kerry refused. The soldier walked with them, again asked to escort them home and again Mrs. Kerry refused. At this point she bid Miriam "good night". Miriam mounted her bicycle and rode in the direction of Manning Tree, but on the road between two bridges he overtook her (R61-62). He solicited her to escort her home but she refused and rode onward toward her home. The man accompanied her on his bicycle. When they reached the "white" bridge (being the bridge nearest Manning

Tree) he repeated his request and then suddenly turned his bicycle into Miriam's bicycle and knocked her to the ground. She struck her head against a telegraph pole and her bicycle fell onto the grass ledge. The soldier grabbed the girl by the hands and arms (R62, 71) and dragged her across the road to the righthand side thereof (R63, 72). In this movement Miriam struck her bicycle and bruised the inside of her left leg (R72). The young woman pulled the soldier's hair, scratched him and kicked him. She escaped his hold and reached a little bank on the edge of a "corn" field on the right side of the road. He followed her and as she screamed he grabbed her by the throat. Miriam tried to kick him but lost her balance and fell to the ground. The soldier kicked her on her left shoulder and dragged her into the field (R64). During this altercation the soldier repeated several times his intention to secure sexual intercourse with her (R64, 73). She succeeded in escaping from the cornfield onto the road pavement near the bicycles. He followed her, grabbed her throat and in the melee Miriam bit his hand (R64, 74-75). At that moment
74 Frank Albert Welham, "Bibury", Harwich Road, Lawford, and Corporal Cecil Carter, Bombardier (British), then stationed at Manning Tree, approached on bicycles (R66, 82-83, 85-86). The soldier, when he saw the two men, pushed Miriam and she fell over her bicycle. He mounted his bicycle and rode in the direction of Brantham — the opposite direction from Manning Tree (R66, 75).

Both Welham and Carter testified that when they met the girl she was sitting on the ground, was crying and was in a shaken, nervous condition. Her clothing was ruffled. She informed them that a "Yank hit me on the head several times" and "I have been attacked by a Yank". Carter escorted the young lady home (R83, 85, 86). Miriam's father (Herbert Arthur Cullum) testified that when she arrived home she was crying. The next day he saw bruises on her neck which remained several days. Subsequently Miriam showed him her bruised legs (R87-88). Police Constable Felton, on Monday 17 July, saw Miriam and observed that the right side of her neck was swollen (R95). The foregoing facts were established by substantial, competent evidence and constitute complete proof of the offense of assault with intent to commit rape. The soldier repeatedly announced his intention to secure sexual intercourse with the young woman. These oral expressions of his felonious intention coupled with the otherwise inexplainable assault and battery he committed on Miriam's

person) fully sustain the findings of the specific intent to commit rape (CM ETO 2807, *Dixon*, and authorities cited therein; CM ETO 4293, *Davis and Bolton*).

5. The theory of the defense was that of alibi and to sustain that plea it produced the following witnesses whose testimony is hereinafter summarized:

Accused elected to appear as a witness in his own behalf. He testified that at 7:00 p.m. on 11 July 1944 he was on duty at the mess hall of the 351st Fighter Group. At 7:30 pm he left the station via post number 2 for East Bergholt. He arrived at his destination "close to 8 o'clock". He rode about the town on his bicycle for about 45 minutes or an hour looking for heavy liquor. Then he went to Brantham —about 1½ miles distant. He went to the "Bucks Horns Inn" and arrived at 9:00 pm. He drank one glass of beer and then went to "The Ark" (R110). He consumed two glasses of beer at the latter public house and left at 9:20 or 9:30 pm. He then went to the "Club" where he consumed another glass of beer remained 15 or 20 minutes and returned to the "Ark" at 9:45 pm. He remained at the "Ark" until closing time and left at 10:40 pm. (It was stipulated that it was 5 miles from the locus of the Dale crime to Gate #2 of the AAF Station 157 (R111-112)). It was three-quarters of a mile from situs of the rape of Sheila Dale to the "Ark" and between 4½ and 5 miles from the "Ark" to Gate #2 of the station. Upon leaving the "Ark" he rode his bicycle toward East Bergholt. Midway between Brantham and East Bergholt—about one-half a mile from Brantham—he encountered an American military policeman named Partyka about 10:15 pm or 10:50 pm (R112). Partyka and accused walked to the top of the hill, stopped five minutes to smoke and then rode slowly to the station. They reached Gate #2 between 11:15 pm and 11:30 pm, and proceeded to the mess hall of the 351st Group, which they reached not later than 11:30 pm. Staff Sergeant LePage and another soldier were present (R113). In the back room there were Sergeants Pelletier, Callendar and Hayes. Accused spoke to all of them. He was in the mess hall until after 12:00 midnight (between 12:00 midnight and 12:30 am) when he went to his barracks (R114, 117).

He denied he had ever seen Miriam except at the identification parade on 18 July when he was in a line of 15 soldiers. When she was "brought out of the guardhouse", a Criminal Investigation Department operative was stand-

ing a "little off" to accused's left, talking with him. had his hand on accused's shoulder (R114). Likewise saw Sheila at the identification parade. He had also her in the "pubs" in East Bergholt, but he did not see on the night of 11 July 1944 (R116). At the parade neither Mirjam nor Sheila looked at his hands which were behind his back (R121).

With respect to the wound on his left hand he testified that on the Thursday (13 July) following the Tuesday (11 July) of the alleged crimes he opened cans of milk with a cleaver and in the operation he stuck his hand (R115) "took a good nick out of it". It bled badly and he asked Sergeant Pelletier for a "band aid" (R116).

The bicycle he rode on the night of 11 July was khaki colored with a new black fender. He has one tooth missing from the left front of his mouth and one in the left rear (Accused displayed his mouth to the court. "His teeth were somewhat widely spaced") (R116, 117). When he left the mess hall he went first to his barracks and then to the orderly room (R118).

Upon cross-examination accused admitted that he could have arrived at the orderly room "any time between 11 and 1" (R118) and that "after 12 o'clock I am not sure of the time" (R119).

"Q. Your judgment of time after 12 o'clock was as good as it was before 12 o'clock on this evening?

A. There was no reason to remember the time after 12 o'clock. I was outside, there was no clock or anything.

Q. Was there an occasion before 12 o'clock for you to remember the time?

A. Yes, sir.

Q. What was that occasion?

A. At that time the radio was on" (R119).

76 He admitted that when he "signed in" he did not state the time he in truth arrived at the orderly room. He guessed at the time and "put down 2400 or 2300, I don't remember which it was" (R120).

Private Andy Partaka, Detachment A, 1260th Military Police Company (Aviation), testified he was at the "Bull and Horn" public house in Manning Tree on the night of 11 July; that he remained until it closed at 10:00 pm; that he actually left the place a "little after" 10:00 pm; that he talked to a girl until about 10:25 pm and then rode his bicycle in the direction of camp (R124). He did not see

about "quarter to 11" on the night of 14 July as he cycled up the hill to East Bergholt. At East Bergholt they stopped for five minutes to smoke, and reached Gate #2 of the camp at 11:30 pm (R125). Upon cross-examination he admitted he was "feeling high" and that

"All the time I didn't know what time it was.

Q. You were just taking what you thought the time was? A. It may have been close to midnight when I came on the post.

A. Yes, so" (R127).

He also admitted that he did not know whether the "Bucks Horn" closed at 10:30 pm or 10:30 pm (R130-131).

Sergeant Joseph C. Pelletier, 352nd Fighter Squadron, declared he saw accused on 11 July between 11:00 pm and 12:00 midnight (R132) when accused came into witness' sleeping apartment (R134). It was about ten minutes after the conclusion of the news broadcast of American Forces Network at 11:00 pm when accused came in the first time (R132). He then went out and returned the second time at approximately 11:45 pm - about 15 minutes prior to the BBC 12 o'clock news broadcast (R135). Witness had no watch or clock and judged the time by the news broadcasts (R134-135). On Thursday (13 July) accused, with one of his hands cut, entered the room where the medical-aid kit was kept and witness was present. Blood was running from his hand and accused said he cut it opening cans (R133). However, Pelletier did not know which hand was cut nor whether it was the index finger or the thumb (R135-136). The cut was around the tack of the left thumb (R136).

First Sergeant Robert A. Hanes, 351st Fighter Squadron, saw accused approximately 11:30 pm or 11:45 pm on 11 July in the kitchen of the mess hall in the 351st Fighter area. He based this time computation upon the fact he left a public house in Dedham between 10:30 pm and 10:45 pm. It was a ride of 30 minutes from the public house to the camp. Witness was in the area 10 minutes and in the mess hall 10 minutes before he saw accused (R137-138). He was positive it was not later than 11:45 pm that he saw accused (R139).

Staff Sergeant Edward R. LaPage, 351st Fighter Squadron, had been in Colchester on 11 July. He left that town about 10:40 pm in a taxicab. It required 25 minutes to travel to camp. He arrived at camp about 11:05 pm or 11:10 pm and went to the mess hall where he

arrived about 11:15 pm. After about 30 minutes, accused entered the hall - about 11:45 pm (R139-140, 142). Witness admitted he had stated to the investigating officer that accused arrived from 30 minutes to an hour after witness reached the mess hall, but now claimed he was confused as to dates (R142). However, he further admitted that he recognized the time from the hour the taxi was ordered to pick him up in Colchester - 10:30 pm - and not from observation of any watch or clock (R143).

Technical Sergeant Stanley E. Phelps, 353rd Fighter Squadron, stated that on the night of 11 July he was at the "P. X." drinking beer until 10:15 pm when the Officer of the Day excluded him from the Exchange (R143). He went to his barracks and then to the mess hall with LaPage. At about 11:30 pm accused entered (R144). Witness admitted that he did not look at any watch during the evening and that he did not know the exact time he saw accused although he said it was 11:30 pm (R145).

Mrs. Grace Somerhill, 63 South Street, Manning Tree, testified that in the community of Manning Tree the reputation of Sheila Winifred Dale for chastity was bad (R146).

6. The court of its own motion called witnesses who testified as follows:

Private Andy Partyka, recalled, testified he was "feeling good" on the night of 11 July. He drank seven or eight pints of beer but could ride his bicycle (R147-148).

Corporal William E. Sterman, Headquarters Detachment, 353rd Fighter Group, was charge of quarters on the night of 11 July. He produced the "in and out" book of the Squadron for that date which showed accused "signed in" at 2300 hours (Court's Ex. 1) (R148-150).

Captain Ernest P. MacGregor, Headquarters 353rd Fighter Group, testified that a soldier coming in from leave should "check in" as of the time he reaches the orderly room (R150-151).

Sergeant Joseph C. Pelletier, recalled, testified that small milk cans were opened by use of a cleaver. A long slit is made in the top of a can (R151).

7. Upon rebuttal the prosecution presented the following witnesses:

Cyril Baker, owner of the "Bucks Horn" Inn in Brantham, testified that on the night of 11 July he closed at 10:30 pm and customers were out of the house by 10:40 pm (R152-153).

Rebecca Emily Roust was the licensee of "The Ark" in Brantham on 11 June 1944. On that date it closed at 10:30 pm and patrons were out of the place five minutes later (R154-156).

Lieutenant Bernard F. Kelly, Headquarters 203rd Figures Group, testified that at AAF Station 157 on 11 July 1944 the time limit on the passes was 0100 hours "but our practice has been to stay out until 2400". It is immaterial whether men sign in, as of the time they arrive at the field or the time they check in the orderly room if it is prior to 0100 hours. Men must be off the street between 0100 and 0600 hours (R155, 157).

8. The vital question in this case arises in connection with proof of identity of the white American soldier who attacked Miriam Florence Cullum with the avowed purpose of securing sexual relations with her, and who raped Sheila Winifred Dale on the night of 11 June 1944. The time element (except dates) with respect to the two crimes was purposely omitted from the foregoing discussion of the proof of elements of the offenses (pars. 3 and 4 *supra*) because the same is extremely relevant in consideration of the question of identity.

(a) *The evidence is substantial and convincing that the same white American soldier committed the two crimes:*

(1) The loci of the offenses were in the near proximity of each other. *Miriam* was attacked on the road from Brantham to Manning Tree opposite a house beyond the "white" bridge (the bridge nearest Manning Tree) (R62, 82-83, 85). The "short cut" road from Brantham to Manning Tree, described by *Sheila*, commences near the "white bridge" (the bridge nearest Manning Tree) on the main Brantham-Manning Tree road (R11). It was about 100 yards beyond this point in the direction of Manning Tree that *Sheila* was knocked from her bicycle by the white soldier (R11). Special Constable Felton discovered the area on the ground where "tall weeds had been broken down as if some person had been lying there" and this spot was on the left-hand side of the road approaching Manning Tree about 100 yards from "Marsh Cottage", the house by the "white bridge" (R89, 94). It was therefore established that the site of the two crimes were approximately *four* yards apart.

(2) The time elements of the two crimes complement each other and are in harmony.

Miriam left Brantham at 10:30 pm. She reached the "Royal Crown" public house at about 10:38 pm, and it was

just prior to that time she first met the soldier (R69). It was 10:40 pm when *Miriam* left Mrs. Kerry and approached the first bridge (R69-70). The soldier "caught up" with her between the first and the second bridge, and "just beyond" the second bridge ("white bridge") he knocked her from her bicycle. The assault was completed and the soldier departed about 10:54 pm (R74). Welham and Carter left Brantham on their bicycles at 10:50 pm. Welham estimated the time he reached *Miriam* as about 11:05 pm. He passed a lone American soldier headed towards Brantham between the two bridges about 200 yards from the girl—about a five-minute ride (R84). Carter saw *Miriam* about a minute after he passed the lone soldier. Two American soldiers on bicycles preceded the lone soldier by three or four minutes (R86). Carter arrived at *Miriam's* home at about 11:15 pm (R86). *Miriam's* father fixed the time of their arrival at 11:10 pm (R87). Betty Goodall, a 16-year-old girl who was a guest at Marsh Cottage—the cottage by the bridge—on 11 July at 10:30 pm went to bed and read. At about 11:00 pm (estimated) she heard screams which came from the road (R89-90).

Sheila left her home at 10:30 with her sister, Pamela, and two American soldiers, "Kentucky" and "California", to cycle to Bergholt (R20, 40). They reached a point designated as the "top of the hill" at about 10:50 pm and *Sheila* went with "Kentucky" about 50 yards beyond "California" and Pamela. They stopped for about 10 minutes and at 11:00 pm started back towards Pamela who had departed (R21-23). At about 11:05 pm *Sheila* mounted her bicycle and started for home in the direction of Manning Tree (R24). It was at 11:10 pm she first encountered the white soldier who eventually raped her (R10, 25). They passed two American soldiers on bicycles at 11:20 pm (R10, 27). She was finally knocked off her bicycle by the soldier at 11:25 pm (R12). The rape was complete by 11:45 pm (R16, 38). *Sheila* reached her home between 11:50 and 11:55 pm (R17, 38, 54).

(3) The description given by *Miriam* of her assailant closely corresponds with the description given by *Sheila* of the man who raped her.

Miriam asserts that her assailant had "fair" hair and several of his teeth were missing. He wore an American soldier's uniform with no stripes. The bicycle he rode she believed was khaki-colored (R65). "He just kept narrowing his eyes" (R65, 79). He had a "roundish" face (R79).

Sheila described her assailant as follows:

"He has a roundish face, fair hair; there is a tooth missing on the left side and I think his other teeth are widely spaced" (R17).

(b) *The identification of accused as the assailant of the two victims is satisfactory, positive and substantial.*

(1) *Miriam* identified accused at the identification parade on 18 July (R68, 77-78) and in the courtroom (R66).

(2) *Miriam* bit her assailant on one of his hands (R64, 74-75). Police Constable Felton on 18 July observed on the ball of accused's left thumb a scab wound (R95) which was not of the type made by the clean cut of a knife. The instrumentality which caused it had penetrated the flesh. It was a penetrating wound (R102) as opposed to a mere abrasion (R103).

(3) The description of their assailant given by both *Miriam* and *Sheila* (par. 8(a)(3) *supra*) corresponds generally with accused's appearance. His hair is "fair, inclined to be dark" (R98). He has one tooth missing from the left front of his mouth and his teeth are somewhat widely spaced (R116-117).

(4) *Miriam* believed the bicycle which the soldier had with him when she was assaulted was khaki-colored (R65). The bicycle which accused rode on the night of 11 July was khaki-colored (R116).

(5) *Sheila* identified accused as her assailant at the identification parade on 18 July (R97, 99) and in the courtroom (R17).

The evidence produced by the defense contains accused's specific denial that he saw or was with either Miriam or Sheila on the night of 11 July 1944. In short, he denies positively his commission of the crimes with which he is charged and asserts that he was at his station or at least returning to his station at the time the offenses were committed. Several of his fellow soldiers testified to facts which in some degree support accused's contention. There was therefore produced an issue of fact which it was the duty of the court to resolve and determine. It was its duty and function to analyze and evaluate both the inculpatory and exculpatory evidence, synchronize and reconcile factors of time and place, judge of the credibility of witnesses and reconcile differences and irregularities in their evidence. The evidence identifying accused as Miriam's and Sheila's assailant as set forth above is not only substantial but highly convincing. Appropriate is this comment:

"With this evidence before the court, it was its province and duty to evaluate it, judge of the credibility

of witnesses and reach a determination whether the accused was the man who committed the atrocious crime. The evidence identifying him as the culprit was substantial and its reliability and trustworthiness are unimpeached. Under such circumstances the finding of the court will be accepted as conclusive and final on appellate review." (CM ETO 3375, *Turpeau*).

81 To the same effect are CM ETO 3290, *Price* and authorities therein cited; CM ETO 3897, *Dixon*; CM ETO 3910, *Hartsell*; CM ETO 4292, *Hendricks*. Upon appellate review the Board of Review must accept as final and binding upon it the findings of the court that accused was Miriam's assailant and Shelia's rapist, and with that conclusion the Board of Review is well satisfied.

9. Only one question with respect to trial procedure and to admission of evidence requires attention. The defense vigorously objected to the admission in evidence of testimony of identification of accused by Miriam and Shelia at the identification parade on 18 July (R97, 99-100). Police Constable Felton testified after objection by defense that Sheila identified accused as her assailant at an identification parade held in camp on 18 July. Miriam was also permitted to testify over objection of defense that she identified accused at the same identification parade on 18 July (R68). The problem thus presented for consideration for the first time before the Board of Review (sitting in European Theater of Operations) deserves careful consideration.

The question as to the admissibility of extra-judicial identification of a defendant in a criminal case is the subject of an exhaustive annotation in 70 ALR 910. Reference is made to said annotation for the citation of authorities. The comment of the editor is informatory:

> "There is a wide split of authority on the question of the competency of evidence of extra-judicial identification in a trial where the identity of the accused as the person guilty of the crime is in dispute. Formerly the rule excluding such testimony was applied by far the greater number of courts. In recent years, however, the tendency has been towards the admission of such testimony, both as substantive and corroborative evidence; so that now there exists a fairly balanced weight of authority on the question, with a slight preponderance of jurisdictions favoring admission" (70 ALR 911).

In view of the annotation of authorities above cited it would be a supererogation on the part of the Board of Review to indulge in an extended discussion of the problem at this time. However, the following quotation is adopted as expressive of the opinion of the Board of Review:

"'The trustworthiness of the identification is of first importance. An identification of an accused, made publicly for the first time by a witness in court, when there presumably have been many opportunities for the witness to have seen the accused and to have heard him spoken of by a given name, may be open to question; but, if it be shown that the witness identified the accused previously and the first time after his arrest or incarceration and under circumstances which removed the suspicion of unfairness or unreliability, the prior identification, together with the circumstances surrounding its making, will be of utmost aid in determining the trustworthiness of the identification made in the court room. Mr. Wigmore puts the reasons for the admission of the prior identification with unanswerable force: "Ordinarily, when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness's act of pointing out then and there the accused (or other person) is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him. * * * To corroborate the witness, therefore, it is entirely proper * * * to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness's mind, he recognized and declared the present accused to be the person." * * * We are not unmindful of the number and character of the courts of the states which take a contrary view, nor of the reasons they give for the exclusion of this evidence. Giving due heed to these, we can but think that their adherence to a technical rule deprived the courts of their jurisdictions of the benefit of a class of evidence which has strong testimonial value when weighed in the scales of the common sense of mankind.'" (State v. Frost, 105 Conn. 326; 135 Atl. 446, quoted in 70 ALR, pp. 911-912).

It appears to the Board of Review not only do reason and logic support the rule permitting the admission of such evidence, but also practical necessity dictates its use. This is particularly true under the circumstances so frequently revealed in records of trial coming before the Board of Review where the issue of the identification of accused is sharply contested. The evidence in support of identification of accused as the malefactor is in the majority of instances dependent upon the testimony of civilian wit-
83 nesses who are nationals of the country in which the Army of the United States is engaged. These witnesses in a great number of instances are unfamiliar with the English language and must give their testimony through interpreters. They also experience difficulty in distinguishing the physiognomy of the American soldier—both white and colored—after the lapse of time between the incident giving rise to the charge and the date of trial. Under these circumstances evidence of their identification of accused within a few hours or days after the incident is perhaps the most satisfactory evidence available. While the argument of necessity cannot be used to support the admissibility of evidence which by a fixed and undisputed rule of law is not admissible, it is a relevant and highly important factor when a forum upon appellate judicial review is required to elect between two conflicting rules of law, each of which is supported by respectable authority.

The Board of Review in electing to adopt the principle that evidence of subsequent identification is admissible has not overlooked the case of *Hopt v. People of Utah*, (110 U. S. 574, 28 L. Ed. 262) decided by the Supreme Court of the United States on writ of error from the Supreme Court of the Territory of Utah in the year 1884. This case is often cited as an authority in support of the doctrine that evidence of subsequent identification is not admissible. If such were the holding of said case the Board of Review would, of course, feel itself duty bound to follow the same. The citator fails to show that the particular point in the Hopt case now under consideration has received subsequently any specific consideration by a Federal court. In *Thompson v. United States*, (144 Fed. (First Cir.) 14, 20) the *Hopt* case was distinguished with the comment:

> "The fact that the person who passed the spurious note . . . was in court and identified by the witness clearly distinguishes the incident from that involved in Hopt v. Utah".

Hoyt was charged with the murder of a man named Turner. In the course of the examination of a doctor who performed an autopsy on a body received at a railroad station in Salt Lake City, the question arose as to whether the body the doctor examined was that of the deceased Turner. The doctor did not know deceased. It was on this point that the court ruled:

> "No proper foundation was laid for the question propounded to the surgeon as to who pointed out and identified to him the body he examined, as that of John E. Turner. He had previously stated that he did not personally know the deceased and did not recognize the body to be his; he did not know that it was the body
> 84 which the father of deceased desired him to examine; consequently, his answer could only place before the jury the statement of some one, not under oath, and who, being absent, could not be subjected to the ordeal of a cross-examination. * * * The specific fact to be established by proof of what some one else said to the surgeon as to the identity of the body submitted to his examination was, that it was the body of John E. Turner. What Fowler, who was not even shown to have been placed in charge of the body nor commissioned to deliver it to the surgeon nor to be acquainted with the deceased, said in the absence of the prisoner, as to the identity of the body, was, plainly, hearsay evidence within the rule recognized in all the adjudged cases. As such it should, upon the showing made, have been excluded" (110 U. S. 581-582; 28 L. Ed. 265-266).

It will be seen therefore that the point involved in the instant case was not in fact raised in the *Hopt* case. There can be no quarrel with the rule therein announced as applied to the facts before the court. The Board of Review therefore concludes that the *Hopt* case is not determinative on the question of admissibility of evidence of subsequent identification of an accused at a "police line-up" or at an identification parade and that it is free to adopt the rule which appears to it more nearly to meet the requirements of justice. In this connection it is interesting to note that in *United States v. Fox*, (97 Fed. (2nd) 913) the discussion of evidence of a "police line-up" identification proceeds on the hypothesis that such evidence was admissible without question (see p. 914).

In the opinion of the Board of Review no error was committed in the admission in evidence of Felton's testimony that Sheila identified accused as her assailant at the iden-

tification parade or of Miriam's statement while on the witness stand that she also identified accused as her assailant at the same identification parade.

10. The charge sheet shows that accused is 33 years four months of age. He enlisted at Syracuse, New York, 2 May 1942 to serve for the duration of the war plus six months. He had prior service in the United States Navy from 11 May 1928 to 11 May 1932. (Character of discharge; undesirable).

11. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

85 12. The penalty for rape is death or life imprisonment (AW 92). Confinement in a penitentiary is authorized for rape by AW 42 and sections 278 and 330 Federal Criminal Code (18 USCA 457, 567), and for assault with intent to commit rape by AW 42 and section 276 Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 Jun 1944, sec. II, pars. 1*b*(4) and 3*b*).

B. FRANKLIN RITER,
Judge Advocate.

ELWOOD W. SARGENT,
Judge Advocate.

EDWARD L. STEVENS, JR.,
Judge Advocate.

86 HEADQUARTERS NYV (G-18)
VIII Fighter Command
Office of the Staff Judge Advocate
APO 637 AAF Station F-341

19 September 1944

Review of the Staff Judge Advocate

UNITED STATES,

v.

PRIVATE BERNARD W. SMITH; 32286877, Headquarters Detachment, 353rd Fighter Group, AAF Station F-157.

Age: 33 years, 4 months.
Total Service: 2 years, 3 months (in the Navy for 4 years—character of discharge—undesirable).
Character of Prior Service: Fair.
Previous Convictions: One.
Restraint: Confined at Station Guardhouse AAF Station F-157 from 18 July 1944.
Date of Trial: 25-26 August 1944.
Place of Trial: AAF Station F-157.

Charges	*Specifications*	*Plea*	*Findings*
I. Violation of AW 92	Rape of 20 year old English girl.	Not Guilty.	Guilty.
II. Violation of AW 93.	Assault with intent to commit rape on 19 year old English girl.	Not Guilty.	Guilty.

Sentence: Dishonorably discharged, confinement at hard labor for life and total forfeitures.

Maximum Punishment: Death or confinement at hard labor for life (mandatory).

1. *Evidence: a. For the Prosecution:* At about 10:30 P. M., 11 July 1944, Miriam Florence Cullum, a 19 year old girl, weighing 118 pounds, left Brantham to go to her home in Lawford, Essex (R 60, 82). She was accompanied by a Mrs. Kerry (R 60). As they were walking along, Miriam wheeling her bicycle beside her, an American soldier passed by. The soldier turned around and came back and asked

whether he could see them home. Mrs. Kerry replied "No", but Miriam said nothing. Nevertheless, the American continued to walk along with them. He asked where they lived. Mrs. Kerry replied, "At Brantham". The soldier retorted that Mrs. Kerry might live in Brantham but that Miriam lived in Manning Tree (R 61, 70). Again he asked them whether he could see them home and was refused. Then Mrs. Kerry left Miriam, and Miriam rode away on her bicycle. Near a bridge on the road to Manning Tree, opposite a small cottage which is the only dwelling in the immediate vicinity, the same soldier caught up with Miriam (R 61, 82, 85). The time was about 10:40 P.M. He asked whether he could see her home several times, but she refused each time. Suddenly he turned the wheel of his bicycle into Miriam's and knocked her off. She struck her head on a telegraph pole (R 62). The soldier then grabbed hold of her arms and started to drag her into the adjoining field. Miriam "pulled his hair, scratched him and kicked him", but he did not let her go. She fell down, and he
87 kicked her in the shoulder (R 63). He dragged her across the road and about 10 or 12 feet into an adjacent cornfield (R 72, 73). She managed to get away and ran back almost to the roadway, screaming. He caught up with her, however, and grabbed her by the throat, which so terrified her that she lost her voice (R 63). All this time he was mumbling to himself, some of his mumblings being unintelligible to her, but she heard him say several times, "I am going to fuck you". She kept on struggling and bit his hand beneath the base of the thumb—in "the fat part of his hand on the inside" (R 61, 74, 81). When she did this, he hit her on the head with his fist and swore (R 64, 74). He was trying to drag her back into the field, when he saw two people approaching. He thereupon pushed her to the ground and rode off (R 74, 75). The two people were a Mr. Welham and a British soldier. At first they passed by the girl but then came back thinking something was wrong with her. They found her crying, lying half in the roadway and half in the grass. They picked her up from the ground. She was nervous and shaking and her clothing was ruffled. She told them that she had been attacked by a Yank. The soldier took her home, Welham going along part of the way. Miriam sobbed nearly all the way back (R 83, 86). She told her mother and father what had happened. The next morning she was stiff all over, had bruises on her left shoulder, bruises on her legs and her throat was swollen (R 67, 88).

Wellman and the British soldier testified that just a moment before they arrived on the scene they saw a white American soldier pass by on a bicycle (R 84, 86). They fixed the time that they arrived on the scene at about 11 P. M. (R 83, 86, 89). Miriam reached Mostaganem at 11:05 or 11:10 (R 86, 87). About 11 P. M., a 16 year old girl who was standing in the cottage (Marabout Stage) near where Miriam was assaulted, heard a woman scream twice, the screams coming from a distance in the direction of the front of the house. She called her mother, but the latter did not hear the screams and said that it was probably someone returning from a dance (R 89-91).

When the attack took place, it was dusk, light enough for Miriam to see. She described him as having a foppish face, fair hair and several teeth missing (R 79). He wore an American uniform without any stripes (R 65). Miriam testified, "I would never forget his face" (R 78). In open court she identified the accused as her assailant (R 66). She had previously identified him in an identity parade, in which about 15 other soldiers were lined up with the accused (R 79). When she walked up to the accused in the line-up, "he narrowed his eyes - the same as he did when he attacked" her (R 79). She had never seen the accused before the night of the attack (R 80).

On the same evening, Sheila Winifred Dale, a girl of 20, had a date with an American soldier called Kentucky, and her sister had a date with another American called California (R 8, 20). The four of them stayed at the Dale home in Manning Tree until about 10:30 P. M., talking and listening to the radio (R 20). The two soldiers asked the girls to ride back with them as far as Bergholt. They rode together until they reached a steep hill, where they dismounted and walked up the hill. Sheila's sister and her partner stopped, and Sheila and her companion walked ahead about 50 yards, stopping at the side of the road (R 21). They stood there talking about ten minutes when California rode by alone. Kentucky walked back a bit with Sheila, but her sister was not in sight. Sheila thought that her sister was riding slowly on ahead and that she could catch up. Kentucky wanted to accompany her, but she told him she could make it alone. Kentucky gave her a good night kiss, a "brotherly kiss", the bicycle being between them, and they parted about 11:05 P. M. (R 24). Sheila rode on about 100 to 150 yards, but saw that it was getting dark so she got off her bicycle and started to walk since she had no

bicycle lights (R 9, 25). Just then an American soldier approached and said, "Hello there" (R 9, 25). Sheila did not answer. She saw the soldier turn his bicycle toward her, so she got on her own and "rode fast", because she "didn't want anything to do with him" (R 10, 25). However, the soldier caught up and rode his bicycle in front of hers and put his hands on her handlebars, causing her to get off (R 10, 26). This was in Brantham, about one mile from Manning Tree. The time was between 11:05 and 11:20 P.M. (R 9, 10). Just then two soldiers came riding by, to whom the other soldier shouted something which Sheila did not understand. Sheila got back on her bicycle and continued to cycle along, the soldier cycling along beside her and talking to her. She did not answer except to tell him she did not want him to see her home (R 11). They reached a bridge near the beginning of a lonely short cut to Manning Tree. The soldier suggested they take the short cut, but Sheila said that she didn't live near there. She cycled about 100 yards further ahead when the soldier caught hold of the handlebars, shook the bicycle and said, "You have got to stop here whether you like it or not." Sheila fell off her bicycle (R 11, 28). The time was approximately 11:25 P.M. The soldier dropped his own bicycle, seized the girl's and threw it on the grass verge. Sheila ran away, the soldier pursuing. She did not run very far. She "was nervous and lost the strength of (her) legs". The soldier caught up, seized her from the back, pinning her arms to her sides, and dragged her into a patch of long grass about 100 yards from the bridge and about 50 to 75 yards away from the nearest house, a cottage. She struggled as he dragged her along and also made excuses—that he would spoil her clothes, that her father would be along any minute, that she had to get up early (R 13, 29). She pleaded with him to let her go, but the soldier took no notice of her talk (R 33). He took his coat off. He forced her to the ground. She screamed several times, but he put his hands on her throat and told her he would murder her if she did not stop. She was "so frightened of him", she didn't scream any more. He started pulling her clothes up. She struggled, kicking her legs and trying to push him off with her hands. He finally got her clothes up and started taking her knickers off. She was kicking and struggling all the time, but he was, nevertheless, able to pull the knickers off (R 14, 30). The knickers were not torn during the struggle but the seam in the fork was split (R 32). He laid on her

right leg with his chest and started pushing her legs apart with his hands. His head was in her lap and his feet stretched out at right angles from her body. She wanted to scream and thought that she did scream. She remembered that he put his hand over her mouth, and that she tried to push his hand away. He got her legs apart and started mouthing her genitals. She could feel his tongue. She could not say how long this lasted; as she testified, "it seemed ages to me but I should say about two or three minutes". All this time, she was trying to raise herself up to see if anybody was coming along the road, but he kept pushing her down (R 15). When he stopped mouthing her she was quite exhausted. She put her legs together, but as she testified, "he was so much stronger than me he mastered me every time." She didn't try kicking him in the groin because she "didn't dare", she "didn't have the right shoes on" and was afraid it might kill him (R 36). When he stopped sucking, he threw himself on top of her, pulled her clothes up farther and inserted his penis into her private parts (R 15). He had difficulty penetrating because she struggled all she could. He was hurting her so much she could not move her hips from under him (R 36, 37). She did not see his penis but it could not have been his finger from the way it hurt (R 37). He kept his penis in her body four or five minutes, all the time moving up and down, breathing very hard and using "terrible swear words to himself", saying "fucking" and "lovely cunt". Then he got off. She felt "wet" on her legs and genitals. He picked up her knickers, threw them at her, and said, "You had better put these on again". This was about 11:45 P. M. She put on her knickers and started "making excuses" because she wanted to get home. She was nervous and "didn't have actually any strength" in her body. She asked him to get her bicycle and he got it (R 15, 16). He asked to see her again two night later. The girl "was frightened that he would start everything all over again", so she said she would meet him again, thinking that he would let her go. He wanted to kiss her good night, and she let him because she saw that "he was getting mad again". Sheila got home about midnight (R 17, 54). She gave a hysterical cry as she entered and called out for her mother, complaining to her that she "had been attacked by a sexual maniac" and that if she "didn't give in to him, he would kill" her. Her sister and an American soldier who was summoned from a nearby house found her hysterical (R 18, 54). Her blouse was un

done, exposing her breast and the snaps of her skirt were undone (R 54, 59). Her hair was unkempt and she was white and shaking (R 59). Her skirt had a "wet mark" on the back, which proved to be a stain from seminal fluid; and the knickers she wore were also stained with seminal fluid in the fork (R 18, 19, 56, 44, 45, Pros. Ex. 1, 2). Sheila's weight is 112 pounds (R 8). During all the struggle her glasses did not come off. They fitted tightly at the nose (R 30, 35). A medical examination the next morning in the presence of the police showed fresh bruises on the right thigh, left arm and left knee and a graze on the left knee. There were no marks on the girl's neck. A vaginal examination showed the girl was not a virgin. Bruises inside the vagina were not indicated. A fairly reliable test for pregnancy administered three times beginning on 2 August indicated that the girl had become pregnant (R 47-52). The test cannot be made accurately during the first three weeks of pregnancy, nor does it indicate the stage of pregnancy (R 50).

89 In court, Sheila described her assailant as having a roundish face, fair hair, a tooth missing in the left side of his mouth and his other teeth widely spaced, and then pointed out the accused as the man (R 17). She had never seen the accused previous to the night in question (R 26). The morning after the attack, she described the soldier to the police as being 5 feet, 10 inches tall, fair-haired, round-faced, teeth widely spaced, with some missing at the top left (Def. Ex. A). On 18 July, at AAF Station F-157, Sheila picked the accused out of a line-up of 16 men as her attacker (R 97-98). On the same occasion, Miriam Cullum also picked the accused out of the line-up as her attacker, but both girls made the identification separately and independently (R 80, 98). When Miriam gave the police a description of the soldier who had attacked her on 16 July, she had not previously talked to Sheila (R 80, 100; Def. Ex. B.).

Sheila testified that she looked at the clock when she and her sister and their dates left the house, and it was 10:30 P. M. then. All other times she testified to were her best judgment (R 40).

On the afternoon of 12 July, a local constable inspected the scene of the alleged rape. At a spot about 100 yards away and on the opposite side of the road from Marsh Cottage, about 10 feet away from a telegraph pole and 6 feet in from the grass verge along the road, the constable found

the grass and weeds broken down. This is very open country with no other houses [sic] for three [sic] to [illegible] yards away (R 84). On 18 July at AAF Station F-156, the constable inspected the accused's hands and found a scab from an incised wound on the 1st joint of the left thumb, which accused stated resulted from a cut with a cleaver, while he was opening milk cans (R 95, 96, 104).

The guard on duty at one of the station gates from 8 to 12 P. M. of the night in question, whose duty it was to check the passes of men going in and out, testified that the accused, accompanied by a soldier named Partyka, came in between 11:30 and 11:45 P. M. (R. 107).

The accused's commanding officers testified that soldiers out on pass are supposed to sign in in the pass book in the Orderly Room of the squadron at the time they come into the Orderly Room (R 157). The 1st Sergeant of the accused's organization testified that the general procedure with reference to the signing in by men on pass was to give the nearest quarter hour in the roster (R 155). The purpose of the roster was to show the hour that men checked in for the night, but there was a looseness about requiring the exact hour to be given (R 156 158). On the night in question the accused signed in at 2300 hours (Court's Exhibit 1).

b. *For the Defense other than the accused:* On the night of 17 July, Pvt. Andy Partyka, Detachment "A", 1260th M. P. Co., AAF Station F-157, was in Manning Tree "floating around and drinking" at various pubs. He left the Bucks Horn Public House a little after closing time with a girl with whom he cycled to the first bridge on the way from Braintham to Manning Tree. He stayed there with her about 15 or 20 minutes and then went on his way (R 124). He met up with the accused at about 10:45 P. M. about ¾ of a mile from the first bridge. They rode into camp together, arriving at the gate about 11:30 P. M. (R. 125). He was not previously acquainted with the accused (R 126). On cross examination, Partyka testified that he was feeling high that night and that he was not sure of the time (R 126). In his own words: "all the time I didn't know what time it was" (R 127). He figured it was 10 P. M. when he left the Bucks Horn because the wongin there called "Time", but he was not sure whether the pub closed at 10 or 10:30 P. M. (R 130). The accused mentioned to Partyka on their way back to camp that he (the accused) "had been out" with a girl or that he "had a girl" that night, the witness' memory not

being clear on this point (R 131). On rebuttal, the Prosecution proved that the Bucks Horn Tavern closed at 10:30 P. M. (R 153).

A number of soldiers with whom the accused worked at the Mess Hall testified as to the hour when they saw him in the Mess Hall on the night of 11 July. Sgt. Joseph C. Pellatier testified that he saw the accused about 10 minutes after listening to the A. F. N. news bulletin, which comes on the radio between 11 and 11:15 P. M. (R 132, 133). On cross-examination, however, he admitted he had no watch or clock to go by (R 134). The accused came into Pellatier's room twice, and about 15 minutes after he left the second time Sgt. Pellatier heard the radio announce 12 P. M. (R 135). Two days later, in the morning, the accused came to Sgt. Pellatier with a bleeding cut on his hand. The accused stated he had cut his hand while opening cans (R 133). 1st Sgt. Robert N. Hayes testified that he saw the accused in the kitchen of the Mess Hall around 11:30 or 11:45 P. M. (R 138). Staff Sergeant Edward R. LaPage testified that he left Colchester about 10:40 P. M., arrived at the base around 11:05 P. M., went to his barracks, and then to the Mess Hall and was in the Mess Hall 5 or 10 minutes when the accused came in sometime between 11:45 and 11:50 P. M. (R 140). On cross-examination, however, LaPage testified that the accused came into the Mess Hall about 1 hour after LaPage got there (R 141, 142). LaPage had no watch, and his estimates as to the time were just his best judgment (R 143). T. Sgt. Stanley E. Pleban testified he saw the accused in the Mess Hall about 11:30 P. M., but he did not remember checking the time (R 144).

Mrs. Grace Somerhill, a resident of the community of Manning Tree for 20 years, testified that the reputation of Sheila Winifred Dale for chastity was bad (R 146).

c. Testimony of the accused. After having been advised of his rights, the accused elected to take the stand as a sworn witness. He testified as to his activities on the night of 11 July substantially as follows: I left the post about 7:30 P. M. and arrived in East Bergholt about 8 P. M. I did some pubbing for about an hour and then went to the Bucks Horn Inn in Brantham about 1½ miles away. I had a glass of beer there and then visited a few other pubs (R 149). The last pub I visited was the Ark, which I left a little after closing time around 10:40 P. M. I drank only beer all evening—four or five pints in all (R 111). It is between 4½ and 5 miles from the Ark to the gate at AAF Station F-157.

turn which the accused returned to the post that night. It is five miles from that gate to the scene of the alleged crime (R 112). On the way towards East Bergnoff I reached a steep hill and got off my bicycle. An M. P. by the name of Partyka came up from behind and we continued along together. This was about 10:50 P.M. (R 112). We stopped about five minutes for a smoke and then came on to the base, riding along slowly. We reached the gate between 11:15 and 11:30 P.M. We then went to the Mess Hall for a sandwich and some coffee. I am positive it was not later than 11:30 that we reached the gate (R 113). I stayed in the Mess Hall until about 12 P. M., speaking to "all" the men who were there at that time. Then I went to my barracks (R 114). I never saw Miriam Cullum before the time of the identification parade. At the time she identified me in the line-up, a C. I. D. man was standing in front of me with his hand on my shoulder (R 114). I never saw Sheila Winifred Dale before the identification parade (R 115). I cut my hand with a cleaver while opening milk cans on 13 July, and I had Sgt. Pellafier put a band aid on (R 115, 116).

On cross-examination, the accused admitted that he had two teeth out, both on the left side of the mouth (R 116). He also admitted that he did not sign in the actual time he got to the Orderly Room. He "just put down 2400 or 2300" as I guess, this being the practice (R 120). He admitted that he chose his own place in the line-up on the occasion of the identity parade (R 121). The accused was riding a khaki colored bicycle (R 116). In her statement to the police, Miriam Cullum stated that her assailant was riding a khaki colored bicycle (Defense Exhibit B). The accused remembered the time before 12 P. M. on the particular evening from the fact that the radio was on in the Mess Hall and the fact that certain people were there who usually came in at a certain time. However, he testified as to his memory on the time after 12 o'clock as follows: "After 12 o'clock I am not sure of the time. There was no reason to remember the time after 12 o'clock. I was outside, there was no clock or anything" (R 119).

2. *Comments: a. Discussion of the evidence.*

An assault with intent to commit rape by an American soldier on Miriam Cullum on the night of 11 July 1944 around 11 P. M. was proved beyond any doubt. The facts as to the attack are almost identical with those in CM 233183, 1943 Bull. JAG, May 1943, Page 188. Here, as in that case, the soldier, a total stranger to the girl, forced his company upon her.

persisted in accompanying her home and on the way knocked her down and dragged her into an adjoining field, desisting only upon the approach of two people. The instant case, however, is even stronger than the one cited for the reason that we are not even left to any inference as to the intention of the attacker, since he made that clear to the girl by his own words as he dragged her off, "I am going to fuck you."

The record also makes out a clear case of the rape of Sheila Winifred Dale by an American soldier, at a spot very near where Miriam Cullum was attacked, and occurring a very short time after that attack. There was proof of sufficient resistance by the girl to negative any inference of consent. She testified that the soldier, a stranger to her, tried to accompany her home against her wishes, that he forced her off her bicycle in a lonely spot, that she ran away from him but that he caught up with her, seized her and dragged her into an adjoining field in spite of her struggles, stopped her screams with threats to kill her, and then, while she was in a state of exhaustion and fright, completed the act of intercourse. Whatever intellectual misgivings may arise as to the sufficiency of the resistance offered by the girl from such small circumstances as the fact that her glasses did not come off during the struggle and that she did not kick him in the groin because she "didn't dare" for fear of killing him fade into insignificance when put in their proper place in the whole picture. "The extent and character of the resistance required of a woman to establish her lack of consent depend upon the circumstances and relative strength of the parties" (CM 236801, 1943, Bull. JAG, August 1943, page 310). The record shows that Sheila weighed only 112 pounds. The court had full opportunity to compare her size with the accused and judge their comparative strengths. The record fully justifies "the inference that she did not in fact consent, that accused had carnal knowledge of her by force, and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death" (CM 227809, 1942 Bull. JAG, December 1942, Page 363; and see also CM 236612, 1943 Bull. JAG, August 1943, Page 310; and Underhill's Criminal Evidence, Section 675). The girl also testified unequivocally that penetration occurred, and her description of the actions and words of the soldier while on top of her were inconsistent with any other explanation than that of completed intercourse. Further proof of penetration was the presence of seminal fluid on her genitals and the subsequent medical examination indicating pregnancy.

In the case of both girls, the fact of the attack was amply corroborated by the testimony of disinterested witnesses as to their physical condition practically immediately after the attack—in the case of Miriam Cullum, only a few moments after, and in the case of Sheila Dale, about 15 minutes after. Both were sobbing, shaking, hysterical and with their clothes dishevelled. The bruises and scratches on their persons furnished further corroboration. Finally, there was the strongest element of corroboration in the immediate complaint of both, by Miriam Cullum that "she had been attacked by a Yank", and by Sheila Dale that she "had been attacked by a sexual maniac."

The most serious question presented by the record is the identity of the attacker. It is believed, however, that it was proved beyond a reasonable doubt that the assailant in both cases was the accused. The morning after the attack on her, Sheila Dale described her attacker to the police, giving a description which the court found fitted the accused.

Several days later, Miriam Cullum described her at-
92 tacker to the police, which again the court found fitted the accused. Both girls independently and separately picked the accused out of a line-up of 16 soldiers at the accused's station as the man who had attacked them. Moreover, both girls gave a testimonial description of their attacker which fitted the accused, even to certain features not always visible like the missing teeth and the other teeth widely-spaced, and then identified the accused in open court as the man. Furthermore, they could not be shaken in their description on cross-examination. As Miriam Cullum testified, "I would never forget his face." There is also the corroborative circumstance of the scab from an incised wound on the accused's left hand, at the spot where Miriam Cullum testified she bit him. The accused explained this scab as resulting from a cut with a cleaver, but the constable who examined it stated that the scab was that of an incised wound rather than of an abrasion or cut. Finally, there is a significant circumstance that both attacks took place in practically the same spot, within a short time of each other, and that the pattern of action of the attacker was practically identical in both cases. The accused attempted to prove an alibi in that he was in the company of Private Partyka or in the Mess Hall at his station when the attacks took place. However all the testimony of the defense witnesses as to the times they saw the accused was indefinite, their estimates of the time being based on their

best judgment. It is significant that the accused signed in at his Orderly Room at 2300 hours, whereas by his own admission he did not get there before 12:30 P. M.; the guard at the gate testified positively that the accused entered the station not earlier than 11:30 P. M.; and none of the defense witnesses, except Partyka, testified that they saw him before 11:45 P. M. As for Partyka, he estimated the hour he met the accused from the time the pub closed, which he thought was 10 P. M., whereas actually the pub closed at 10:30 P. M. In addition, Partyka testified that on their way back to camp, the accused commented that he had been out with a girl, a fact which the accused omitted mentioning in his own testimony when he took the stand *before* Partyka. Furthermore, the court could easily have believed from the actions of the accused after he reached the station that he was deliberately attempting to establish an alibi. In this connection, it is to be noted that the accused testified that he spoke to "all" the men in the Mess Hall that night; and, although his memory of the time before 12 o'clock was exact, he testified that "there was no reason to remember the time after 12 o'clock". Accused's conduct with respect to the cut on his hand two days later also suggests a purpose of establishing an alibi. At any rate, the court heard both the prosecuting and the defense witnesses and the accused, and the members of the court were the best judges of their credibility.

b. *Irregularities:* It was error for the Law Member not to permit Sheila Dale's mother, her sister and an American soldier who was present at the time to testify as to the complaint of being raped made by Sheila as soon as she arrived home. Similarly, it was error not to permit Miriam Cullum's father to testify as to the complaint made by her when she arrived home. Both complaints were made at the earliest opportunity, while both girls were still visibly affected by the attack, and were clearly admissible as exceptions to the hearsay rule (MCM 1928, paragraph 115*a*, Page 118; Underhill's Criminal Evidence, Section 667; CM 228891, 1943 Bull. JAG, January 1943, Page 8; Wharton's Criminal Evidence, Page 989). It is also questionable whether the ruling of the Law Member was correct in admitting testimony of the reputation of Sheila in the community for chastity, since the question of consent was not put in issue by the defense (Underhill's Criminal Evidence, Section 676; Wharton's Criminal Evidence, Page 732). However, both these rulings were clearly in favor of the accused and no possible prejudice could have resulted to

him. The prejudice to the prosecution's case was minimized, since both prosecutrix with [illegible] were compelled to testify as to the complaints made by them, and other witnesses testified to the physical condition of the girls after the attacks.

It was, perhaps, an irregularity for the court, over the objection of the defense, to permit the two girls to be present during the summations. However, the defense's objection was based on possible facial expressions and gestures by the girls which might improperly influence the court, and it may be safely assumed from the lack of objection by Defense Counsel after the summations that no such improprieties occurred. The practice of having a prosecuting witness sit in court during any part of the proceedings is not forbidden by the Manual, and it is certainly the general practice in civil criminal cases, so that at most it was a harmless irregularity.

The Defense made strenuous objection to any testimony regarding the identification by the two girls of the accused in the identity parade held at the accused's station a week after the attacks. It would seem hardly to require argument that it was highly relevant and material that both girls separately and independently, were able immediately to pick the accused out of a line-up of 16 men in which the accused was not conspicuously placed and of which he was a representative example. A test of the competency of this line of testimony is to ask the question whether or not, if the girls had picked a man other than the accused as their attacker, the defense could properly have proved that fact in its case. Obviously, the testimony would be admissible, and no reason is apparent why the same rule should not apply in the reverse situation. Underhill's Criminal Evidence, page 1267, states that it has been "held proper to ask a witness how soon after the arrest the defendant was identified by the prosecutrix, where his identity was one of the main questions", citing *State v. Jeffcoat*, 192 N. Car. 318, 135 S. E. 22. But even if error was committed, it was harmless in view of the positive identification of the accused in open court.

c. Prejudicial Errors: The record is legally sufficient to support the findings and sentence. There are no errors prejudicial to the substantial rights of the accused, and the sentence is the mandatory sentence required by Article of War 42.

d. *Miscellaneous:* In civil life, the accused was a resident of Syracuse, New York. He enlisted at Syracuse, New York, on 2 May 1942. Although he had had no prior service in the army, he was in the United States Navy from 11 May 1928 to 11 May 1932, the character of his discharge being undesirable. His civilian occupation was a sheet metal worker. He is married and has one illegitimate child and two stepchildren. He is a high school graduate. His AGCT score was 112, putting him in Group II. His service record does not reveal any record of criminal convictions in civil life. His character ratings from the date of enlistment are given as Unknown, Poor, and Excellent. The service record gives his efficiency ratings as Not Observed, Unknown and Satisfactory. Although only one previous conviction by court-martial could properly be considered by the court, that being for 5 days AWOL, the service record shows three other previous convictions for AWOL, from 13 September to 21 October 1942; from 1 January 1943 to 9 February 1943; and from 2 April to 14 April 1943.

Prior to the trial of this case, the accused was sent to the 221st Station Hospital, APO 69, U. S. Army for psychiatric examination. The diagnosis of his case was "constitutional psychopathic state; inadequate personality". The report goes on to state, "The cross section study of his entire mental life shows that he is an emotionally unstable individual, with poor judgment, limited ability to learn from experience, and a poorly-developed sense of responsibility." The conclusion was reached, however, that the soldier was not mentally defective, nor did he give any evidence of being mentally insane in the past or at the time of the crimes charged; that he could differentiate between right and wrong and was responsible for his actions.

e. *Clemency:* No clemency was recommended by the court and none is recommended at this time. The two attacks made by the accused in such quick sequence mark him as a dangerous sexual criminal, and his past record does not argue in favor of clemency.

94 3. *Recommendations:* It is recommended that the sentence be approved, but that the execution be withheld, pending action under Article of War 50½ by the Branch Office of the Judge Advocate General in this theatre. The following action is suggested, pending notification from the Board of Review that the sentence may be ordered executed:

"In the foregoing case of Private Bernard W. Smith, 32286877, Headquarters Detachment, 353rd Fighter Group, the sentence is approved. The United States Penitentiary at Lewisburg, Pennsylvania, is designated as the place of confinement. Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld."

RICHARD J. KENT,
Captain, J. A. G. D.,
Ass't. Staff Judge Advocate.

I concur in the foregoing review and the recommendations contained therein.

BURTON S. HILL,
Lt. Col., J. A. G. D.,
Staff Judge Advocate.
13 August 1944.

95

To: Trial Judge Advocate of General Courts Martial appointed per Par. 1, Special Order No. 195, Headquarters VIII Fighter Command, 9 August 1944.

1. The accused, Private Bernard W. Smith, Headquarters Detachment, 353rd Fighter Group, AAF Station F-157, having been served with a copy of the charge sheet in this case on 12 August 1944 requests, through his regularly appointed defense counsel, a delay of ten (10) days as to the date of trial in order to properly investigate the facts and to prepare his defense.

WILLIAM KAPELMAN,
Captain, Air Corps,
Defense Counsel.

96

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CHARGE SHEET

AAF STATION F-157, APO 637, 19 July, 1944.
(Place) (Date)

Name, etc., of accused Smith, Bernard W. 32286877 Pvt
(Give last name, first name, and middle initial
Hq. Det. 353rd Fighter Group, APO 637, AAF Station
in that order followed by serial number, grade, company, regiment, arm or
F-157, U. S. Army.
service, or by other appropriate description of accused. Alias names, etc., to follow in same manner)

Age 33 yrs 4 mos Pay, $60.00 per month. Allotments to (Base pay plus pay for length of service)
Class "F" $22.00
dependents, $..... per month.
Class "E" None

Government Insurance deduction, $7.25 per month.

Data as to service: Prior Service: U. S. Navy—11 May 1928 to 11 May 1932 (Character of discharge: Undesirable) Current Enlistment: Enlisted at Syracuse, New York, 2 May 1942 for the duration of war plus six months. (As to each terminated enlistment, give including dates of service and organization in which serving at termination. As to current enlistment, give the initial date and the term thereof. Give similar data as to service not under an enlistment)

Data as to witnesses, etc.: ..... (Give names, addresses, and note if for

Against the Accused: accused. List documentary evidence and note where each item thereof may be found)

1. Sheila Winifred Dale
   Victoria Cottages
   Station Road,
   Lawford, Essex.
2. Miriam Florence Cullum
   57 Colchester Road,
   Lawford, Essex.

For the Accused: None

Documentary Evidence: None

Entries on page one hereon pertaining to the accused have been verified by the undersigned.

ERNEST P. MACGREGOR
Captain, Air Corps.
Commanding.

Data as to restraint of accused: Placed in confinement at (Give date, place, and initial date of any restraint of accused)
Station guardhouse, AAF Station F-157, 1600 hours, 18 July 1944.

97 CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group E.F.M. did at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July

1944 forcibly and feloniously, against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages Station Road, Lawford, Essex.

CHARGE II: Violation of the 93rd Article of War.

E.P.M. E.P.M.

~~Specification: In that Private Bernard W. Smith, did at Ipswich-Manning Tree Road, on or about 11 July 1944 with an intent to commit a felony, viz: to have unlawful carnal knowledge of Miriam Florence Cullum, commit an assault upon Miriam Florence Cullum age 19, 57 Colchester Road, Lawford, Essex, by forcibly dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.~~

E.P.M E.P.M.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group, did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz, rape, commit an assault upon Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.

(Additional sheets, if necessary, for charges and specifications will be attached here. Ordinary 8 by 12½-inch paper will be used for additional sheets)

(2)

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VOS

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(Signature of accuser) ERNEST P. MACGREGOR
Captain, AC., Hq. Det.
353 Fighter Group,
(Grade, organization, arm or service)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 12th day of July, 1944, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he ~~has personal knowledge of the matters set forth in specifications~~ .....
(Indicate by specification and charge numbers)
.....; ~~and/or~~* has investigated the matters set forth in ~~specifications~~ the Specification of Charge I and Charge I and Specification of Charge II and Charge II and that the same are true in fact, to the best of his knowledge and belief.

(Signature) RALPH A. JOHNSON CAPT AC
(Grade and organization)
Adjutant AAF Station F-157
(Official character, as summary court, notary public, etc.)

NOTES.—At (*) strike out words not applicable.
If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof, and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively as to any particular charge or specification, that he either has personal knowledge or has investigated.
If the oath is administered by a civil officer having a seal, his official seal should be affixed.

1st IND.

Headquarters VIII FIGHTER COMMAND, AAF STATION F-341, APO 637, 9 August, 1944
(Place) (Date)

Referred for trial to Capt. Harley J. McNeal, Trial Judge Advocate.
(Grade, name, and organization of summary court, or trial judge advocate)

General court-martial appointed by paragraph 1, Special Orders No. 195 Headquarters VIII FIGHTER COMMAND
(Summary) (Trial judge advocate of special or general)
9 August, 1944

By Command of Brigadier General Griswold:
(Command or order) (Grade and name of commanding officer)

W. T. DURKOF, *Adjutant.*
W. T. DURKOF,
Major AGD.
Asst. Adj Gen.

99 I have served a copy hereof on (each of) the above-named accused, this 12th day of August, 1944.

(Signature) HARLEY J. MCNEAL, *Trial Judge Advocate.*
Capt J A G D
(Grade and organization)

(Space for use Where Trial is by Summary Court)
CASE NO. .....

Specifications and Charges	*Pleas*	*Findings*	*Sentence or Acquittal and Remarks*

Place ....., Date ....., 19....
..... Summary Court.
(Signature, grade and organization)
Headquarters ....., 19....
(Place and Date)
.....
(Action of reviewing authority)
..... *Commanding.*
(Signature, grade and organization)
Entered on service record in cases of conviction .....
(Initials of personnel adjutant)

(4)

Hq SOS USAPP 9-43/50M/15116
(Write Nothing Below this Line)

100 HEADQUARTERS N-V (G-21)
VIII FIGHTER COMMAND
Office of the Staff Judge Advocate
APO 637, AAF Station F-341

7 August, 1944.

SUBJECT: Advice of Staff Judge Advocate.
To : Commanding General, VIII Fighter Command.

1. The attached charges have been referred to me for consideration and advice under the provisions of Article of War 70 and paragraph 35b MCM.

2. I have carefully examined and considered the charges and accompanying papers, including the report of investigation made in compliance with Article of War 70, and submit herewith my report and recommendations:

3. *Personal Data concerning the accused:*

a. *Smith, Bernard W., 32286377, Private. Headquarters, 353rd Fighter Group.*

b. Age: 33 years, 4 months.

c. Total Service: 2 years, 3 months. Also 4 years service in U. S. Navy from 11 May 1928 to 11 May 1932. Character of discharge: Undesirable.

d. Character of prior service: Fair.

e. Previous convictions: One.

4. *Summary of Charges:*

A.W.	*Gist of specifications:*
92	Rape of 20-year old British girl.
93	Assault with intent to commit rape on 19-year old British girl.

5. *Maximum Sentence:*

Mandatory punishment of death or life imprisonment

6. The specifications allege, in correct form, offenses under the Articles of War alleged to have been violated and are appropriate to the indicated evidence in the case. In my opinion, a *prima facie* case exists, justifying trial upon the specifications and charges. There is nothing in the papers to indicate any reason for doubt of the sanity of the accused at the time of offense or at present. In view of the gravity of the charges, the accused was given a neuro-psychiatric examination at the 121st Station Hospital, the report of which states that the accused, although "an emotionally unstable individual, with poor judgment", is nevertheless "not mentally defective, nor has he presented any evidence of being mentally insane in the past, nor at the time of the alleged charge."

7. It is recommended that the charges be referred for trial to a general court-martial.

BURTON S. HILL,
Lt. Col., J. A. G. D.,
Staff Judge Advocate.

101 CONFIDENTIAL

15th M. P. CRIMINAL INVESTIGATION SECTION
APO 559, U. S. Army BES bs

23 July 1944.

SUBJECT : Report of Investigation.
TO : C.G., 8th Fighter Command, APO 637, U. S. Army.
THROUGH : Provost Marshal, 8th Fighter Command, APO 637, U. S. Army.

1. Herewith submitted is report of investigation conducted by the Criminal Investigation Division in the matter of Pvt. Bernard W. Smith, ASN 32286877, Hq. Det. 353 Fighter Group, APO 637, U. S. Army.

BART E. SULLIVAN
2nd Lt., CMP
Comdg. Dist.

Received
28 Jul 1944
Headquarters 8th
Fighter Command

102 CONFIDENTIAL

CRIMINAL INVESTIGATION DIVISION
SERVICES OF SUPPLY, UNITED STATES ARMY
EUROPEAN THEATER OF OPERATIONS

(1) FILE:	(2) TITLE: Rape Assault with Intent to Commit Rape Pvt. BERNARD WILLIAM SMITH ASN 32286877, Hq. Det. 353 Fighter Group, APO 637, U. S. Army. VICTIMS: SHEILA WINIFRED DALE Victoria Cottages, Station Road, Lawford, Essex. MIRIAM FLORENCE CULLUM No. 57, Colchester Road, Lawford, Essex.
(3) AUTHORITY: VO, TPM.	
(4) BASIS: Investigation requested on 13 July 1944 by Capt. Henry A. Foster, APM, 1192nd M.P. Co. Avn., Det. B, APO 559, U. S. Army.	
(5) DATE: 13 July 1944.	
(6) AGENTS ASSIGNED: Bertram Sussman Alexander Springer Agents, C.I.D.	(7) STATUS: Pending

(8) WITNESSES:

1—Sheila Winifred Dale, Victoria Cottages, Station Road, Lawford, Essex.

2—Miriam Florence Cullum, No. 57, Colchester Road, Lawford, Essex.

3—Pamela Joy Dale, Victoria Cottages, Station Road, Lawford, Essex.

4—Ellen May Dale, Victoria Cottages, Station Road, Lawford, Essex.

5—Betty Goodall, No. 45, Peel Road, Wembley, Middlesex.

6—Frank Albert Welham, "Bibury", Harwich Road, Lawford, Essex.

7—Wilfred John Felton, P. C. 305, Mistley Police, Mistley, Essex.

8—Dr. Frederick H. E. Beckett, High Street, Manningtree, Essex.

9—Sgt. Joseph Pelletier, ASN 11050769, 351 Ftr. Sq., APO 637, U. S. Army.

CONFIDENTIAL

103 (9) LIST OF EXHIBITS:

A—Statement of Sheila Winifred Dale, dated 12 July 1944.

B—Statement of Miriam Florence Cullum, dated 17 July 1944.

C—Statement of Pamela Joy Dale, dated 13 July 1944.

D—Statement of Ellen May Dale, dated 12 July 1944.

E—Statement of Betty Goodall, dated 13 July 1944.

F—Statement of Frank A. Welham, dated 17 July 1944.

G—Statement of Wilfred J. Felton, P. C. 305, undated.

H—Statement of Dr. Frederick H. E. Beckett, dated 12 July 1944.

I—Statement of Pvt. Bernard W. Smith, dated 18 July 1944.

J—Statement of Sgt. Joseph Pelletier, dated 19 July 1944.

K—Clothing of Sheila W. Dale, in possession of Mistley Police, now being scientifically tested in the Police Laboratories.

(10) PROGRESS:

On 13 July 1944, this office was informed by Capt. Henry A. Foster, APM, 1192nd M. P. Co. Avn., Det. B, APO 559, U. S. Army, that a rape had been reported in Lawford, Essex.

On 13 July 1944, these agents contacted the civil police at Mistley, Essex, and in the company of P. C. W. J. Felton and Det. Constable Chaplin of the Essex County Constabulary, visited the scene of the alleged rape, and interviewed the owner of the Bucks Horns P. H., Brantham, Suffolk.

On 13 July 1944, these agents, accompanied by P. C. Felton and Det. Con. Chaplin, proceeded to the B. X. Plastics Factory, Brantham, Suffolk, where Pamela Joy Dale, Victoria Cottages, Station Road, Lawford, Essex, was interviewed and statement obtained by P. C. Felton.

On 13 July 1944, these agents proceeded to Victoria Cottages, Station Road, Lawford, Essex, where Sheila Winifred Dale, the complainant, was interviewed, and arrangements made to have her keep an appointment made with an unknown American soldier at Brantham, Suffolk.

On 13 July 1944, these agents proceeded to Brantham, Suffolk in the company of P. C. Felton and Det. Con. Chaplin, and observed the place of appointment but no American soldier kept the appointment.

On 18 July 1944, these agents were informed by P. C. Felton of an assault upon Miriam Florence Cullum, No. 57, Colchester Road, Lawford, Essex, on 11 July 1944 in Lawford, Essex.

On 18 July 1944, these agents attended an identification parade at Station 157, U. S. Army, where Sheila W. Dale and Miriam F. Cullum in the presence of P. C. Felton, Det. Con. Chaplin and Captain MacGregor, Hq. Det., 353 Ftr. Gp., APO 637, U. S. Army, identified Pvt. Bernard William Smith, ASN 32286877, Hq. Det., 353 Ftr. Gp., APO 637, U. S. Army as their assailant.

On 18 July 1944, these agents interviewed and obtained statement from Pvt. Bernard W. Smith. (Exhibit 1).

On 19 July 1944, these agents proceeded to Station 157 and interviewed Sgt. Donald Roy Callender, ASN 35407790; Sgt. Arnold Larson, ASN 36328803;
104 and Sgt. Roy J. Grant, ASN 14123836; and interviewed and obtained statement from Sgt. Joseph Pelletier, ASN 11050769, all of the 351 Ftr. Sq., APO 637, U. S. Army. (Exhibit J).

On 19 July 1944, these agents proceeded to the Mistley Police Station, Essex, and arranged to have the

statements of the civilian witnesses forwarded to this office.

On 22 July 1944, these agents obtained from the Essex County Constabulary the statements of Sheila W. Dale; Miriam F. Cullum; Pamela Joy Dale; Ellen May Dale, Victoria Cottages, Station Road, Lawford, Essex; Betty Goodall, No. 45, Peel Road, Wembley, Middlesex; Frank A. Welham, "Bibury", Harwich Road, Lawford, Essex; Wilfred J. Felton, P. C. 305, Mistley, Essex; and Dr. Frederick H. E. Beckett, High Street, Manningtree, Essex. (Exhibits A, B, C, D, E, F, G, & H).

(11) STATEMENT OF FACTS:

On or about 11 July 1944, at approximately 2330 hours, Miss Sheila W. Dale, Victoria Cottages, Station Road, Lawford, Essex, while cycling on the Ipswich Road, Lawford, Essex, was accosted by an American soldier who forced her to have sexual intercourse with him without her consent. (Exhibits A, C, D, E, G, H & K).

On 18 July 1944, Miss Sheila W. Dale identified Pvt. Bernard W. Smith, ASN 32286877, Hq. Det., 353 Fighter Group, APO 637, U. S. Army, as her assailant. (Exhibits A, G & I).

On or about 11 July 1944, at approximately 2300 hours, Miss Miriam F. Cullum, No. 57, Colchester Road, Lawford, Essex, was accosted by an American soldier on the Ipswich Road, Lawford, Essex, who assaulted Miss Miriam F. Cullum with intent to commit rape upon her. (Exhibits B, F & G).

On 18 July 1944, Miss Miriam F. Cullum identified Pvt. Bernard W. Smith as her assailant. (Exhibits B, G & I).

Pvt. Bernard W. Smith denies having committed any offense against Miss Sheila W. Dale and Miss Miriam F. Cullum and claims he was at his base at the time of the assaults. (Exhibits I & J).

Pvt. Bernard W. Smith is presently confined to the Guardhouse at Station 157, U. S. Army.

(12) SIGNED:

BERTRAM SUSSMAN,
Agent, C. I. D.

ALEXANDER SPRINGER,
Agent, C. I. D.

105 (13) FORWARDED:
BART E. SULLIVAN,
2nd Lt., CMP,
Comdg. Dist.

(14) DISTRIBUTION:
Original: C. G., 8th Fighter Command, APO 637, U. S. Army.
2 Copies: C. G., 8th Air Force, APO 634, U. S. Army.
Copy : TPM, ETOUSA, APO 887, U. S. Army.
Copy : C. O., Hq. Det., 353 Fighter Group, APO 637, U. S. Army.

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106 PRETRIAL INVESTIGATING OFFICER'S REPORT

AAF Station F-157, APO 637, U. S. Army

24 July 1944.

Subject: INVESTIGATION OF CHARGES.
To: Commanding Officer, AAF Station F-157, APO 637, U. S. Army.

1. I have investigated the inclosed charges dated 19 July 1944 against Bernard W. Smith, 32286877, Pvt. Hq. Det., 353rd Fighter Group, APO 637, U. S. Army in accordance with the provisions of Article of War 70 and paragraph 35*a*, Manual for Courts-Martial. At the outset of the investigations, I informed the accused of the nature of the charges alleged against him; of the names of the accuser and witnesses, so far as known to me; of the fact that the charges were about to be investigated; of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and that it was not necessary for him to make any statement with reference to the charges against him, but that if he did make one it might be used against him.

2. In the presence of the accused, I have examined the following-named
~~all available~~ witnesses and documentary evidence and have reduced the material testimony given by each witness, under direct and cross examination, to a statement embodying the substance of the testimony taken on both sides, which said statement is attached hereto as hereinafter indicated:
FOR THE ACCUSED: As shown on Exhibit A.
The following two witnesses against the accused were examined by me in his presence and he was allowed to ex-

amine and cross-examine them with my assistance: Miriam Florence Cullum and Sheila Winifred Dale. Their testimony substantiated their statements shown on Exhibit B, with additional matter as shown on Exhibit C.

3. The substance of the expected testimony of the following-named witnesses ~~either~~ in ~~oral or~~ written form was made known to the accused who stated he did not desire to cross-examine such witnesses and therefore the same were not called or examined in the presence of the accused.

Frank Albert Welham, Pamela Joy Dale, Mrs. Ellen May Dale, Frederick Harry Eli Beckett, Betty Goodall, Wilfred John Felton. Statements of these witnesses are included in Exhibit B.

4. The following documents have been examined, shown to the accused, and are appended:

Exhibits A, B, and C

107 5. The accused, after he had been carefully warned by me as above indicated, * said that he did not desire to make a statement.—~~or~~—* ~~made the statement hereto attached.~~ (Ex. .....).

*Strike out words not applicable.

6. Explanatory or extenuating circumstances: None.

7. There is no reasonable ground for a belief that the accused is now, or was at the time of the commission of the alleged offense(s), mentally defective, deranged, or abnormal.

8. Trial by General Court Martial is accordingly recommended.

9. There is attached a record of one previous convictions committed during the current enlistment and within one year preceding the commission of the offense for which the accused is now charged. (Par. 79, MCM.)

10. In arriving at my conclusions, I have considered not only the nature of the offenses and the evidence in this case, but I have likewise considered the age of the accused, his military service, the necessity for preserving the manpower of the Nation in the present emergency, of salvaging all possible military material, and the established policy of the War Department that trial by general court martial will be resorted to only when the charges can be disposed of in no other manner consistent with military discipline.

ALAN B. TODD,
(Signature)

ALAN B. TODD.
(Name, typed)

1st Lt. Inf.
Det "A", 1260th Military Police Co. (Avn).
(Grade and organization)

108 EXHIBIT "A".

The following witnesses requested by accused were duly sworn and testified, in substance, on 21 July 1944 as follows:

Sgt Donald R. Callendar, ASN 35407790

That he is a cook in the mess hall of the 351st Fighter Squadron and has known the accused pretty well for the past three months, and has been acquainted with him for about a year. That he was not on duty on the night of 11 July 1944, and went to his barracks which adjoins the mess hall, after supper, although he is not sure of the time. That he was in bed in his barracks between 2200 hours and 2400 hours that night and remembers seeing the accused come in and talk to Sgt Pelletier about a date they had in Ipswich the following night. That he does not remember what time it was but is pretty sure it was after 2200 hours.

Cpl William E. Sterman, ASN 12040220

That he has known the accused since April 1943. That he was on duty in the Orderly Room of his organization as Charge of Quarters on the night of 11 July 1944. That he does not remember seeing Private Smith at all that night, either signing out or signing in, although it is quite possible that accused may have done so without his seeing him or remembering that he saw him if he did in fact see him since many men of the organization sign out and in during pass hours.

Sgt Joseph C. Pelletier, ASN 11050769

That he is a cook in the mess hall of the 351st Fighter Squadron and has known the accused for about 14 months. That he came off duty about 1900 hours on the night of 11 July 1944 and went to the Red Cross for a while and then returned to his barracks which adjoin the mess hall. That so far as he remembers he went to bed about 2200 hours and that Private Smith came in sometime later, he thinks about 2315. He fixes this approximate time in his mind because accused talked to him about 15 or 20 minutes about their dates in Ipswich the next night and then went back into the kitchen and about 15 minutes later the midnight news broadcast came on the radio. That Private Smith did not discuss with him where he had been that night.

1st Sgt Robert A. Hayes, ASN 12036859

That he knows the accused who works as a cook in the kitchen of the 351st Fighter Squadron. That he did remember seeing Private Smith in the kitchen of the mess hall with a soldier he didn't know one night last week and he thinks it was the night of Tuesday 11 July 1944, because that was a night he went to a Pub in Dedham. That he was in the kitchen when accused came in from the outside with the other soldier, and as far as he can remember it was between 2300 and 2400 hours, and probably closer to 2400.

Sgt Roy J. Grant, ASN 14123836

That he is a cook in the mess hall of the 351st Fighter Squadron and that he has known the accused for about nine months. That he came off duty in the mess hall about 1900 hours on 11 July 1944, and went to his barracks which is connected to the mess hall. That he does not remember whether he went back into the kitchen again that night and does not remember having seen accused that night, although it is usually Private Smith's custom to go to the kitchen for something to eat after coming in off pass.

109 S/Sgt Joseph F. Rosinski, ASN 36339972

That he is a mechanic in the 351st Fighter Squadron and knows who the accused is but does not know him personally. That he does not remember whether he was in the mess hall on the night of 11 July 1944 or not. That he does go to the mess hall sometimes for something to eat after he works late at night.

Sgt John W. Johnson, ASN R-1239082

That he does not know the accused. That he was on duty in the Orderly Room of his organization on the night of 11 July 1944, and that he went to the mess hall for something to eat that night but does not remember the time. That he saw some men in the mess hall but does not remember who they were.

S/Sgt Joseph Perna, ASN 32278892

That he has known accused merely as an acquaintance for about 2 months. That he does not remember being in the mess hall of his organization on the night of 11 July 1944.

The following witnesses requested by accused were duly sworn and testified, in substance, on 22 July 1944 as follows: -

Pfc Harrison J. Wakely, ASN 31220055

That he was on duty as sentry at road gate #2 at AAF Station F-157, from 1800 hours to 2400 hours on 11 July 1944. That he remembers a soldier from his company, Private Andy Partyka coming through his gate in company with another soldier who he now recognizes as the accused. That it was almost 2400 hours when they came through the post and he fixes this time in his mind because it was just a few minutes afterwards that he started getting his equipment ready to go off post. That he is usually relieved from this shift about 2400 hours and sometimes before that. So far as he remembers it was after blackout time that accused and Partyka came through his post but they did not have their bicycle lights on, although he had to use his flashlight to check their passes. He does not think it could have been more than 20 minutes before he went off duty that accused came through his post. That accused asked Partyka to go to his (accused's) mess hall for something to eat, and does not think that either soldier was drunk.

S/Sgt Edward R. La Page, ASN 19000833

That he knows the accused who works in the mess hall of his organization. That on 11 July 1944, he went to the mess hall a little after 2200 hours with T/Sgt Stanley Pleban after returning from the PX. That he remembers the accused coming into the mess hall with another soldier whom he said was an M. P. and that some conversation in a light tone took place about this. That he does not remember the exact time accused and the M. P. came in but he thinks it was about a half hour or an hour after he and Pleban went to the mess hall.

Sgt Arnold A. Larson, ASN 36328803

That he is a cook and has known the accused for about two months and works with him in the mess hall of the 351st Fighter Squadron. That he has gone into the mess hall at night after returning from Ipswich almost every night for the past two weeks. That it is usually about 2400 or 0100 when he returns to the station from his pass. That he does not remember what he did on the night of 11 July 1944.

110 T/Sgt Stanley E. Pleban, ASN 33351538

That he knows the accused who works in the mess hall of his organization. That he remembers being in the mess hall with S/Sgt La Page on the night of 11 July 1944, when accused came in with a soldier who was an M. P. He think that it was sometime between 2230 and 2330 when they came in but he does not know exactly what time it was. It was probably about 2245 but he is not sure.

Pvt William Vandergrift, ASN 33598365

That he is acquainted with Winifred Dale of Victoria Cottages, Lawford. That on the night of 11 July 1944 he was visiting a young lady who lives 3 or 4 doors from Miss Dale and that at about 2345 hours Winifred Dale's sister Pamela came to the house where he was and asked him to go to her home as "Winnie" was crying. That he went there and found Winifred Dale who was crying and that she told him she and her sister Pamela had been out with their boy friends. That Pamela had gone on home ahead of her and that she had started a little later and as she came near a bridge between Brantham and Manningtree an American soldier had stopped her and took her by the throat and threw her off her cycle. That he told her if she didn't "come across" with what he wanted he was going to kill her. That the soldier took her bike and threw it over a hedge. That he assumed the soldier got what he wanted. That Winifred Dale told him the soldier made her promise that she would meet him on the bridge the following Thursday night. That she said there were two other soldiers who came along right after the soldier assaulted her and that he left then.

The following witnesses requested by the accused were duly sworn and testified, in substance, on 23 July 1944 as follows:

Pvt Andy (nmi) Partyka, ASN 33677026

That he has not known the accused but now recognizes him as the soldier he rode back to the station with on the night of 11 July 1944. That he went on pass that night about 1930 hours and rode his bicycle to Manningtree to a Pub. That he drank about 6 or 7 pints of beer and left to come back about 2230 or 2240. That as he was cycling up the hill from Brant-

ham he caught up with accused, also going back to camp and they rode in together. That they stopped for about 5 minutes in E. Bergholt to have a smoke. That they then rode right back to camp without stopping and got to Gate Post #2 about 2300 hours. That accused asked him to go to his mess hall for something to eat, which they did. That they stayed there about 15 minutes and then he (Partyka) went to his own company and he thinks he signed in. That it was getting dark when he got there.

That about 5 minutes after they reached the mess hall about 4 or 5 men came in, who seemed to be coming in off pass. That he did not talk to these men. That there were 2 cooks in the kitchen when they went in but no one in the mess hall.

That accused told him he had had his girl from Ipswich out that night, but did not say anything about being in Manningtree.

That when they got to the mess hall accused got him a salami sandwich and some coffee. That he asked one of the men who came in what time it was but does not remember what time he told him.

That accused did not appear to him to be drunk. That they did not use their lights on their bikes but when they got to the gate post the sentry used his flashlight to check their passes.

That it usually takes him 20 or 25 minutes to ride back to the station by himself from Manningtree and perhaps a little longer when he is with someone.

111 Cpl. William N. Prettyman, ASN 32079010

That he is a cook in the mess hall of the 351st Fighter Squadron and has known the accused merely as an acquaintance for about a month. That he was on duty in the mess hall on 11 July 1944 from 2030 hours until 0230 hours the next morning. That he remembers seeing the accused come into the kitchen that night to cook a hamburger and that it was after 2200 hours because he remembers just having finished fixing the first two pans of meat for the next day. That he thinks he started fixing the meat about 2200 hours and it usually takes him about an hour to fix all the meat. It was before the guards came in to be fed that he saw accused. The guards start coming in about 0030 or 0100 to be fed.

112 EXHIBIT "B"

Original statements in the pocket book of P.c. 305 r—m, Pages Nos. — 137, and 142. taken at 7 P.M. 17.7.44 at No. 57, Colchester Rd, Lawford, and at 7.45 p.m. 18.7.44 at Raydon Aerodrome, respectively.

Certified True Copy.

s/E. W. SHIPHERD
Detective Sergeant.

A TRUE COPY
ALAN B. TODD.
1st Lt. Inf.

STATEMENT of FRANK ALBERT WELHAM, age 35, of "Bibury", Harwich Road, Lawford. Works Foreman,
Who saith:

At about 11.40 p.m. on Tuesday, 11th, July, 1944 I was cycling along the Ipswich Road, Brantham towards Lawford. I was accompanied by a regular soldier. Bdr. C.N. Carter, of the 330th, Searchlight Batt., Lawford our Home Guard instructor. About half way between the two bridges an American soldier passed us going towards Brantham. I did not take particular notice of him.

When we got opposite Marsh Cottoge, we saw the lady's cycle lying beside the road. We heard someone crying and found a girl lying in the long grass. She made a complaint that she had been assaulted by an American soldier. Her clothing was disarranged and covered with dust. The soldier escorted the girl home to Lawford. No other American soldier passed us between the one we saw between the bridges and the girl. I cannot describe him.

s/D. J. Felton (Witness) (Signed) F. A. WELHAM
Pc. 305 Mistley. Original statement in the pocket book of Pc. Felton Pages 138-139 taken at 7.30.p.m. 17.7.44 at "Bibury", Harwich Road, Lawford.

Certified True Copy.

E. W. SHEPERD.
Det/Sergt.

A TRUE COPY
ALAN B. TODD,
1st Lt. Inf.

STATEMENT OF SHEILA WINIFRED DARE, N.R.I.C. TXKK. 65.5. Factory Hand, age 20, of Victoria Cottages, Station Road, Lawford. States on 12.7.44:-

At 8.45 pm. on Tuesday, 11th. July, 1944, I returned from Ipswich to Manningtree by train. I was with my sister Rita. We walked home from the station. I stayed at home and at 9.20.pm. my sister Pam came in with two American soldiers who I know as Kentucky and California. I do not know their proper names. They stayed in the house until about 10.30 pm. when Pamela and I decided to cycle as far as Bergholt with them. When we got to Bergholt we all stopped. We separated and I went along the road with Kentucky for about 50 yards and stood talking to him. After about 10 minutes my sister shouted out to me that she was going home and shortly afterwards the soldier California went passed riding his cycle. I left Kentucky and started to ride home. While I was with Kentucky I had no sexual relations with him and never have.

Just before I got to the Bucks Horns P. H., Brantham I saw an American soldier riding a cycle towards Bergholt. It was getting dark and I was walking as I had no lamps. As the soldier got near me he said, "Are you going home how far are you
113 going?" I did not answer him. He then turned round and cycled slowly beside me. He got off near the brick bridge near the river and said, "How much farther have you got to go?" I said, "Not far". He said, "Manningtree?" I said, "Yes". He then said, "You have got to stop here". I said, "I am not going to stop". I could smell he had been drinking. To get away from him I got on my cycle and rode along the Ipswich Road towards Manningtree Railway Station. He started to cycle beside me and said, "I am going to see you home".

When we got to the footpath which leads from the Ipswich Road into Station Road he said, "You can take a short cut that way". I said, "No, I cannot get home that way". About 100 yards further down the road he said, "You have got to stop here whether you like it or not". He got off his cycle and shook the handle-bars of my cycle. I fell off and the soldier dropped his cycle in the road. He threw mine in the long grass beside the road. He then put his cycle in the grass.

I started to run away, he ran after me, and pulled me onto the grass and pushed me down. I said, "If you don't let me go my father will come along in a minute". I made more excuses to try to get away and said "The grass will spoil my clothes". He said "I will take me coat off". I then managed to get up and ran away screaming. He ran after me and pushed me down again. He put his hands around my neck and said, "If you don't shut up I will murder you. I am not going to hurt you". He pulled my skirt up and tried to pull my knickers off. I struggled and screamed but he managed to pull them off one leg. He put one hand over my mouth and pulled one of my legs apart. He laid on that one and pulled the other one open. He put his mouth on my private parts and I could feel him sucking me. All the time I was trying to get away and screaming. He did this for some time. He then stopped and laid on top of me. I screamed and said "I will see you another night". He would not let me go. I then felt his person being put in my private parts. I cannot remember seeing him take it out of his trousers. I started to scream again and he said, "If you don't stop screaming I will hurt you more". He then started saying "Fucking lovely cunt". During this time he was moving up and down on top of me and I could feel his person moving in my private parts. After a while he got off and I could feel some fluid on top of my legs and private parts.

The soldier got up and buttoned his trousers and coat up. I did not see his person. I got up and pulled my knickers up and my skirt down. I said, "Will you get my cycle?" He went and got it and said, "Do you want me to see you home?". I said, "No, I will go home alone". He said, "Will you see me again?" I said, "Yes", so that I could away. He said, "Will you make it Thursday?" I said "What time?" He said, "Seven O'clock on the bridge over there, make it the second bridge".

He then let me go home and on the way I did not pass anybody. I got indoors just after twelve. I have never seen this soldier before. He was about 5'10", fair hair, round faced, American soldier's uniform, no hat, teeth widely spaced, with some missing at the top left. I feel sure that I could recognize

him again. I cannot describe his cycle. It is not the first time a man has had intercourse with me. When I got home, I complained to my mother.

114 At 7.15 p.m. on Tuesday 18th July, 1944, I attended an identification parade at Raydon Aerodrome. I picked a man out, who was paraded with fifteen other men, as the one who had asaulted me on Tuesday 11th July, 1944. I had not seen this man between the day of the assault and the identification parade s/

D. J. Felton (Witness) (Signed) S. W. Dale
P. c. 305, Mistley.

Original statements in the pocket book of P.c. 305 Felton, Pages Nos. 112-119, and 141, taken at 10.30 am. 12.7.44. at Dr. Beckett's Surgery, Manningtree, and at 7.45 pm. 18.7.44, at Raydon Aerodrome, respectively.

Certified True Copy

s/ E. W. Shepherd.
Detective Sergeant.

A True Copy
Alan B. Todd.
1st Lt. Inf.

Statement of Pamela Joy Dale, Age 18 years, of Victoria Cottages, Station Road, Lawford, Factory Hand. Who saith:

About 7 p.m. on Tuesday 11th July, 1944, I went to the Pictures at Lawford with two American soldiers who I know as "California" and "Kentucky". I believe their names are Walter Selby and Raymond Eves. We came out at 9.15 p.m. and went to my house.

When we arrived we found my sister Sheila had returned from Ipswich. We all stayed in until about 10.30 pm. when Sheila and I decided to ride part of the way back with Americans. We cycled as far as Touchy Hill, East Bergholt, arriving there at about 10.45 pm. We all stopped, Sheila and "Kentucy" walked about 50 yards up the road. We stood talking until I heard a clock strike eleven. I called "Winnie". She did not answer me. I started to cycle home, and told "California" to tell "Winnie" I had started. Would she hurry and catch me up.

I started to cycle home slowly, but "Winnie did not catch me up. Just before reaching the Pepper Mill, a Yank came towards me on a cycle. He did not speak to me. When I got to the Bucks Horn P. H., Brantham, I saw two Yanks with cycles. One of them said "Goodnight" to me. After seeing these two men, I saw no one else on the road before I reached home at about 11.30 p.m.

I waited until about 11.45 p.m. for "Winnie" but she did not come home. I went upstairs and told my mother that "Winnie" had not come home and then went to bed.

I had not been in bed long before I heard "Winnie" coming down the yard on her cycle. I heard her throw the cycle down and come in. When she came in I heard her crying and screaming. She said "Mum, come down quick. Pam why didn't you wait for me?" I went downstairs and saw "Winnie" in the kitchen lying on a sofa crying. I heard "Winnie" make a complaint against an American soldier who had assaulted her.

s/ D. J. Felton (Witness) (Signed) P. J. Dale
P.c. 305, Mistley.

Original statement in the pocket book of P.c. 305 Felton, Pages No. 125-129, taken at 11 am, 13.7.44. at B.X. Plasties, Brantham, Suffolk.

Certified True Copy

s E. W. Shepherd
Detective Sergeant

A True Copy,
Alan B. Todd.
1st Lt. Inf.

Statement of Mrs. Ellen May Dale, age 42 years, of Victoria Cottages, Station Road, Lawford. Married Woman. Who saith:

I am the mother of Sheila Winifred Dale, who was born on the 21st February 1924. She resides with me at Victoria Cottages, Station Road, Lawford.

About 10.30 p. m. on Tuesday 11th July, 1944, my daughters, Sheila and Pamela left my house in company with two American soldiers who I know as "Kentucky" and "California" with the intention of cycling with them to Bergholt.

About 11.30 p. m. I had just gone to bed when "Pam" came in. She said "I have been waiting for Win. I don't know where she has got to. I am too frightened to go back as it was dusk".

Just after twelve o'clock, I heard some one come in the front door and I could hear the person crying. Shelia then called out to me, "I have been attacked by a maniac and if I hadn't given way to him he would have murdered me". I got up and came downstairs and I saw my daughter sitting in a chair screaming. She was very upset. Her hair was all rough and her clothes dishevelled. She then said "A Yank has taken my knickers down and assaulted me". I said, "Do you know him?" She said, "No". I then told her to have a hot bath straight away which she did. I told her to go to the Doctor's first thing the next morning and she did so. After she had undressed to have a bath, I had a look at my daughter's clothing and saw that there was a wet stain on them.

s/ D. J. Felton (Witness) (Signed) E. M. Dale
P.c. 305, Mistley

Original statement in the pocket book of P.c. 305 Felton, Pages Nos. 122-125, taken at 3.30 pm. 12.7.44, at Victoria Cottages, Station Road, Lawford.
A True Copy

Certified True Copy

s/ E. W. Shepherd
Detective Sergeant

Alan B. Todd, 1st Lt. Inf.

Statement of Frederick Harry Elf Beckett, of High Street, Manningtree. Medical Practitioner.
Who saith:

On Wednesday 12th July, 1944, about 10 am. in consequence of a complaint made to me by Winifred Dale of Victoria Cottages, Lawford, I examined her and found bruises of the right thigh, left knee, left arm and fresh graze left knee.

She was not *virgo intacta*. From physical examination, I was unable to state that intercourse had taken place recently.

s/ D. J. Felton (Witness) (Signed) F. H. E. Beckett
P.c. 305, Mistley

Original statement in the pocket book of P.c. 305 Felton, Pages No. 111-112, taken at 10.15 am, 12.7.44 at Dr. Beckett's Surgery, High Street, Manningtree.

116 Certified True Copy

s/ E. W. Shepherd
Detective Sergeant

A True Copy
Alan B. Todd, 1st Lt. Inf.

Statement of Betty Goodall, aged 15 years 11 months, of No. 45, Peel Road, Wembley. Machine Operator.
Who saith:

On Tuesday 11th July, 1944, I was staying with my Grandmother at Marsh Cottage, Lawford, and I went to bed about 10.30 p.sm. I laid reading a book and after some time, it must have been about 11 p. m., I heard two short screams, with about a minute between them. The screams came from the roadway in front of the house and not from the back of the house. They seemed to be in the distance and not close to the house.

s/ D. J. Felton (Witness) (Signed) Betty Goodall.
P.c. 305 Mistley.

Original statement in the pocket book of P.c. 305 Felton, Pages No. 129-130, taken at 12.15 pm, 13.7.44. at Victoria Cottages, Station Road, Lawford.

Certified True Copy

s/ E. W. Shepherd
Detective Sergeant

A True Copy
Alan B. Todd, 1st Lt. Inf.

Statement of Wilfred John Felton, Police Constable, No. 305, Stationed at Mistley, Essex.
Who saith:

About 10 am. on Wednesday, 12th July, 1944, I received certain information from Doctor Beckett and: and as a result I went to his surgery at High Street, Manningtree, where I saw the witness Shelia Winifred Dale. She made a complaint to me and as a result I took possession of a pair knickers and a skirt.

About 3. pm. the same day in company with Det. Chaplin and the witness Dale I went to the Ipswich

Road, Lawford and at a spot on the greensward, 10 feet on the Suffolk side of telegraph pole A 29 and 6 feet from the road I saw where the grass had been flattened and some tall weeds broken as if some person had been lying down. The nearest house (Marsh Cottage) to this spot is 100 yards away. The surrounding country is open.

About 7.30 pm. on Monday, 17th. July, 1944, in consequence of information received I interviewed the witness Miriam Florence Cullum at her residence at 57 Colchester Road, Lawford. She made a complaint to me and I saw that the right side of her neck was swollen.

As a result of these two complaints I made enquiries and on Tuesday, 18th. July, 1944 in company with Det. Chaplin I visited the U.S.A.A.F. Aerodrome at Raydon, Suffolk. At about 3.15 pm. I was present when the accused "Smith" was interviewed by Lt. Todd and Lt. Minnella, A.P.M. On examining his left hand I saw a wound scab on the base of the thumb.

At 6.30 pm. we were shown a spot on the Ipswich Road, Lawford which the witness Miriam Florence Cullum said was the spot she had been assaulted by an American soldier. This was the same spot as where the assault on the Witness Shelia Winifred Dale had taken place.

At 7.15 pm. the same day I was present at the Raydon Aerodrome when the accused "Smith" was placed on an identification parade with fifteen other men. I saw the witnesses Cullum and Dale pick "Smith" out as the man who had assaulted them on Tuesday, 11th. July, 1944.

s/ D. J. Felton P.c. 305 Mistley

Certified True Copy

s/ E. W. Shepherd
Detective Sergeant

A True Copy
Alan B. Todd, 1st. Lt. Inf.

Exhibit "C"

117 Shelia Winifred Dale, Victoria Cottages, Station Road, Lawford, Essex, being duly sworn, testified on 23 July 1944, upon examination and cross-examination before the accused in substantiation of the facts as set forth

in her statement shown in Exhibit B and in addition as follows:

That it was about 2305 hours when her sister, Pamela Joy Dale, shouted out to her that she was going home.

That when she got home after the incident on 11 July 1944, her sister Pamela went to a friend's house and brought an American soldier down to see if he could be of any assistance, and she told him what had happened.

That she knows Miriam Florence Cullum but has never been out with her.

That she was in the Bucks Horns Public House about a year and a half ago but has not been in there since that time.

That she had never seen accused before the night of 11 July 1944, and that she is positive he is the soldier who attacked her.

MIRIAM FLORENCE CULLUM, 57 Colchester Road, Lawford, Essex, being duly sworn, testified on 23 July 1944, upon examination and cross-examination before the accused in substantiation of the facts as set forth in her statement shown in Exhibit B, and in addition as follows:

That she does not go to the Public Houses but that she did go to the Bucks Horns Public House with her boy friend's mother once about a year ago. That she has not been there since.

That she has never been out with American soldiers but holds no dislike for them.

Shelia

That she knows Winifred Dale but has never been out with her.

That when she complained of the assault mentioned in her statement taken on 17 July 1944, to her mother, she was urged by her mother not to report it as she (her mother) felt the soldier had just been drunk and there was no need to get him in trouble. That later on that week a man who lives near her and who works at the same place Shelia Winifred Dale works told her that Miss Dale had been attacked on the night of 11 July 1944. That her father then urged her to report it to the Police, which she did.

That when the soldier who assaulted her had hold of her throat and looked over her shoulder, her back

was to the bridge in the direction from which the soldier and civilian came. That they were riding bicycles and told her the soldier who passed them as they approached her said goodnight to them, and hence they didn't think at the time that he was the one who was causing the commotion.

That when she gave the description in her statement of the soldier assaulting her she was not previously told of any description of any soldier in any other like incident. That she was not prompted in making her description in any way and was not asked to compare her description of the soldier assaulting her with any other soldier.

That she had never seen the accused before the night of 11 July 1944, and that she is sure he is the soldier who assaulted her.

118 .....

(Leave the Space Above This Line for Indexing).

SMITH, BERNARD W., Pvt
(Name of Accused)

1st Ind.

HQ, AAF STATION F-157, APO 637, U. S. Army, 20 July 1944.

TO: 1st Lt ALLAN B. TODD, 01287269, INF, Det A 1260th MP Co (Avn).

You are hereby designated to investigate, in accordance with the provisions of the 70th Article of War, paragraph 35a, M. C. M., and the supplemental noted for Investigating Officers, locally supplied, the charges herewith dated 19 July 1944, against the accused named above.

By order of Lieutenant Colonel RIMERMAN:

R. A. JOHNSON,
Captain, Air Corps,
Adjutant.

Incls: No change.

2nd Ind.

ALAN B. TODD, 1st Lt. Inf., AAF Station F-157. 24 July 1944.

TO: Commanding Officer, AAF Station F-157, APO 637, U. S. Army.

1. Accomplished.

2. Report of investigation is enclosed herewith as inclosure #1.

3. Delay in submitting this report was caused by difficulty in obtaining statements of civilian witnesses taken by British Civil Police which were necessary to check testimony taken during the investigation.

ALAN B. TODD,
1st Lt. Inf.

4 Incls—
Incl 1—Charge Sheet
Incl 2—Evidence of Previous Convictions
Incl 3—Time Data Sheet
Incl 4—Report of Investigating Officer

119

Note: It is important to observe directions in the footnotes.

(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

HQ, Det. 353rd Fighter Group, APO 637
19 July, 1944

Subject: Court-Martial Charges against Bernard W. Smith
To: Commanding Officer[1] AAF Station F-157, APO 637, U. S. Army.

1. In compliance with paragraph 32, M.C.M., there are forwarded herewith court-martial charges which it appears probable will not be disposed of either under A.W. 104 or by reference to a summary court-martial, signed by me as accuser against the person subject to military law named above.

2. Summaries of expected testimony upon which the charges are based are attached.[2]

3. Documentary evidence upon which the charges are based is attached, as follows: None.

4. There is attached evidence of 1 previous convictions of accused, taken from his Service Record or other sources,

[1] This letter will be addressed to the company or other immediate commander of the accused (if this officer is not himself the accuser), and signed by the accuser immediately following paragraph 3. The company or other immediate commander will enter his "Forwarding Indorsement" (not numbered) to the regimental commander or other officer exercising court-martial jurisdiction, immediately following the signature of the accuser, so as to include the concluding paragraphs of the form.

In case the company or other immediate commander is also the accuser, the letter will be addressed directly to the regimental commander, or other officer exercising court-martial jurisdiction.

[2] Summaries of expected testimony may be brief and informal.

which may be considered by the court in case of a conviction upon the present charges.

5. Character of accused's service prior to offenses here charged:[1] Fair.

6. In my opinion he should[3] be eliminated from the service.

7. I recommend trial by General court-martial.

ERNEST P. MACGREGOR,
Captain, Air Corps.
Immediate Commander of Accused.

Incls.:
Charge Sheet.
Summaries of Expected Testimony
Documents listed in pars. 3 and 4

Hq SOS USAPP 11-43 25M 17775

C.M.—Form 1—Letter of Transmittal.

120 (To be retained as part of file)

~~CONFIDENTIAL~~
Classification
~~changed~~ cancelled
Date JAN 14 1947
By—Ellwood W. Sargent
E. W. S.

CM ETO 3837 Name Pvt BERNARD W. SMITH (32286877)

ORG. Hq. Det., 353rd Fighter Group.

TRIED 25-26 Aug, 1944, at Hq, VIII Fighter Command, AAP Station F-157, Eng. At time of commission of offense accused was 33 years 4 mos. of age, having completed 6 yrs. 2 mos. service.

OFFENSES OF WHICH CONVICTED

CHARGE I: Viol. of the 92nd AW.
Spec: Rape.

CHARGE II: Viol. of the 93rd AW.
Spec: With intent to commit rape, dragged victim from highway into a field, hitting her with fist

[1] Use the form provided if there are any previous convictions to be considered; if not, enter "no" in the blank space. This entry will be accepted as the company commander's certificate that there is no evidence of previous convictions to submit.

[2] Enter "Excellent," "very good," "good," "fair," "poor," or "unknown," and such other comment as may appear appropriate.

[3] Enter "should" or "should not." Add statement of reasons, *e.g.* "because of moral turpitude involved," or other appropriate comment in explanation of opinion and recommendation.

on head, taking hold of her throat with his hands and kicking her in the back with his foot.

MAXIMUM AUTHORIZED SENTENCE. DEATH
SENTENCE IMPOSED LIFE.
REDUCED BY R. A. No. TO DD, TF, CHL .... YRS. .... MOS.
PREVIOUS CONVICTIONS 1-Spec. CM—AWOL for 5 days in viol. of the 61st AW.
FIELD REVIEW ADOPTED? No as to summary of evidence only.
RECORD LEGALLY SUFFICIENT AS TO FINDINGS? YES. SENTENCE? YES.
CLEMENCY RECOMMENDED? No.
REMARKS:

Classification
~~changed~~ cancelled
Date JAN 14 1947
By—Ellwood W. Sargent
E. W. S.

~~CONFIDENTIAL~~

.....
Chairman for Board of Review.

121
8FC Form #429 HEADQUARTERS
VIII FIGHTER COMMAND
Office of the Staff Judge Advocate
APO 637 AAF Station F-341

MEMORANDUM to accompany the record of trial in the case of:

Smith, Bernard W. (Name) Private (Rank) 32286877 (Serial No.)
Headquarters Detachment, 353rd Fighter Group
(Immediate and next higher organization)
who was tried at AAF Station F-157
on charges alleging violation of: A.W. 92 and 93.

Chronology	*Date*	*No. of Days*	*Explanation*
1. Offense Committed	11 July 1944		
2. Accused confined:			
By civil authorities			
By military authority			
By military authority ordering trial	18 July		* Accused not suspected until this date.
Reconfined from escape			

3. Charges preferred	19 July	1	
4. Charges investigated	24 July	5	Great number of civilian witnesses
5. Charges forwarded by C.O.	24 July	0	
6. Charges received J.A.	27 July	3	
7. Charges—action Staff J.A.	7 August	11	Accused hospitalized for psychiatric examination for 4 days. Selection of new court and defense counsel.
8. Charges referred for trial	9 August	2	
9. Trial had:	25-26 August	16	
Total to trial		38	
Less time in hospital		4	See attached letter from Special defense Counsel who was located at different station from accused.
Less delay at request of defense		10	
NET TOTAL		24	Voluminous record. Necessary to send it to three stations for authentication.
10. Record of trial received.	11 September	16	
11. Review by Staff J.A.:	19 September	8	
12. Action by Commanding General:	20 September	1	
TOTAL TO ACTION C.G.		49	Withheld pending action under A.W. 50
13. Mimeo. orders received:			
14. Record of trial mailed to J.A.G.O.	22 September	2	
		51	

TOTAL

Action	Trial
13 July	13 July
31 Aug.	26 Aug
20 Sept	
64	39
—14 delay	—14 delay
50	25

Date 28 September, 1944.

Remarks:

RICHARD J. KENT
Captain, J.A.G.D.
Asst. Staff Judge Advocate.

All delays must be fully explained.
Disregard first day; count day action taken.

122

~~CONFIDENTIAL~~
Classification
~~changed~~ cancelled
Dated Jan 14 194
By Ellwood W. Sargent
E. W. S.

IN 16 P. M.
26 Sep 1944
BJAGO-ETO

RECORD OF TRIAL
of,

SMITH, BERNARD W. 32286877
(Last name) (First name and middle initial) (Army-Serial No.)

Private Hq. Det. 353rd Fighter Group
(Rank) (Organization)

AAF Station F-157
(Station)

by

GENERAL COURT-MARTIAL
appointed by the Commanding General of the
VIII FIGHTER COMMAND
Tried at
AAF STATION F-157
25 August-26 August, 1944

CERTIFIED AND PASSED:
Chief of Division .....
Examiners Section .....
Statistical Section E. B. H.

Received
27 Sep 1944 9-0 A. M.
Board of Review
OJAG-ETOUSA
CS

~~CONFIDENTIAL~~
Classification
~~changed~~ cancelled
Date Jan 14 1947
By Ellwood W. Sargent
E. W. S.

Classification changed to RESTRICTED
Auth: TJAG Guy W. Rogers, Jr.
Capt. J460

Date: 31 Jan 46

SEC 47890
2574-C

C.M. Form 10—Record of Trial, G.C.M.—Cover (Front)

123 INSTRUCTIONS

1. This cover and other printed forms (C.M. Forms 10 to 18) for record of trial by general court-martial will be used in preparing such records in cases to which they are reasonably adapted without extensive alterations. In any case in which the form does not provide adequate space to record the actual proceedings, in accordance with Appendix 6, M.C.M., the printed skeleton sheets which are so deficient will not be used, and that part of the record will be typed, using the form sheets as models to the extent applicable.

2. The printed forms have been so devised that deletions of the printed text will rarely be required. When necessary to delete, line out with pen and ruler. When several consecutive lines are to be deleted a single line from upper left to lower right will suffice. Do not make trivial changes which have no significance. Be sure, however, to delete any part of the printed wording which does not speak the truth (as applied to the particular record) or which you do not intend to use for any reason.

3. The record of trial by general court-martial, and accompanying papers, will be bound by the trial judge advocate in the following order:

a. This Cover Sheet.
b. The trial judge advocate's indorsement transmitting the record.
c. General Court-Martial Data Sheet (A.G.O. Form No. 116).
d. The Charge Sheet.

e. Papers accompanying the charge sheet when referred for trial (less duplicate copies delivered to accused) in the following order:
   (1) Accuser's letter of transmittal of charges.
   (2) Reference for investigation.
   (3) Investigating Officer's Report.
   (4) Summaries of Evidence submitted by Investigating Officer.
   (5) Forwarding Indorsements.
   (6) Other papers accompanying the charges (if any).
   (7) Advice of Staff Judge Advocate.

f. A copy of the reporter's voucher or a statement that the reporter is a civilian employee not entitled to extra compensation. See par. 21, AR-35-4120, April 16, 1936).

g. Carbon copy of the record (if not desired by the accused).

h. Record of former hearings (if any).

i. The second Cover Sheet, marked (Record Proper).

j. The Record of Trial proper, in the following order:
   (1) Index sheet, with receipt of accused for copy of the record (if a copy is delivered to him).
   (2) Record proper of the proceedings in court (pages numbered at bottom).

   Page 1 of the record is the mimeographed sheet furnished to the trial judge advocate beginning with the words "Proceedings of a general court-martial convened at ..... pursuant to the following orders:", followed by the complete text of the order appointing the court. Amending orders, if any, follow as pages 2, 3, etc., and after the last of them follows printed C. M. Form 12, showing those present and absent, appropriately numbered at the bottom.

   (3) Exhibits (marked at bottom A, B, C, etc., in the order introduced).

   Attach each exhibit to a separate sheet of legal cap size, if the exhibit is not itself of that size.

   (4) Other papers ordered appended by the court (if any).
   (5) Clemency papers.

k. The back Cover Sheet.

Hq 8 OS USAPE/7-43/5M/12280

124 GENERAL COURT-MARTIAL DATA SHEET

OF

Smith, Bernard W. 32286877, Private,
(Last name) (First name) (Middle initial) (Army serial No.) (Grade)

Hq. Det. 353rd Fighter Group
(Company, regiment, or arm or service)

J. A. G. O., C. M. No. 279112

		Trial J. A.		Staff J. A.		J. A. G. O.	
		Yes	No	Yes	No	Yes	No
1.	Was court ordered by proper authority?	V		V		V	
2.	Are all orders showing membership of court properly entered in record?	V		V		V	V
3.	Were there less than five members detailed or present at any meeting?		V		V		V
4.	Was the law member of the court designated by convening order?	V		V		V	
5.	If the presence of the law member was specifically required by the convening authority, was he present at each session?	—	—	—	—	—	—
6.	Did the court have jurisdiction of person and offense?	V		V		V	
7.	Does the record show place, date, and hour court convened?	V		V		V	
8.	Are all members of the court, trial judge advocate, assistant trial judge advocate, defense counsel, and assistant defense counsel accounted for as present or absent?	V		V		V	
9.	Was accused asked whom he desired as counsel?	V		V		V	
10.	Was reporter sworn?	V		V		V	
11.	Was interpreter sworn?	—	—	—	—	—	—
12.	Was accused extended right of challenge as to each member of the court, and was he instructed as to his right to exercise one peremptory challenge against any member except the law member?	V		V		V	
(13.)	Was action of court upon challenges regular and properly taken?	—	—	V		V	
14.	Was the court sworn?	V		V		V	
15.	Was any officer sitting as a member of the court the accuser, a witness for the prosecution, or, upon a rehearing, one who sat as a member on the former trial?		V		V		V
16.	Was the personnel for the prosecution sworn?	V		V		V	
(17.)	Was the accused properly arraigned?	—	—	V		V	
18.	If pleas of guilty were explained was accused's response, if any, recorded?	—	—	—	—	—	—
(19.)	Does each specification state an offense under the Articles of War?	—	—	V		V	
20.	Are there copied into the record—						
	(*a*) Charges and specifications?	V		V		V	
	(*b*) Name, grade, and organization of the person signing charges?	V		V		V	

		Trial J. A. Yes	Trial J. A. No	Staff J. A. Yes	Staff J. A. No	J.
	(c) Affidavit to the charges and specifications?	V		V		
	(d) Name of the person who administered the oath verifying the charges, and his official capacity?	V		V		
	(e) The order of reference for trial?	V		V		
(21.)	If the accused was advised of his right to plead the statute of limitations, was his response, if any, recorded?	—		—		
22.	Are pleas of accused regularly entered?	V		V		
23.	Were the witnesses sworn?	V		V		
24.	Are the findings properly entered?	V		V		
25.	Was the vote upon each finding by secret written ballot?	V		V		
26.	Was sentence reached by secret written ballot?	V		V		
27.	Did at least two-thirds of members present at the time the vote on each finding was taken concur therein?	V		V		
125						
28.	In each case of finding of guilty where death sentence was mandatory, did all members present concur in each finding?	—		All members concurred in all will resent directive		S V
29.	Did members present concur in sentence, as follows: To death, all members; to life imprisonment or confinement for over ten years, at least three-fourths of members; to any other punishment, at least two-thirds?	V		V		
(30.)	Does the evidence sustain the findings of the court?	—		V		
31.	Are the findings legal?	V		V		
32.	Is the sentence legal?	V		V		
(33.)	Does any ruling of the court on the admission of evidence or other matters injuriously affect the substantial rights of accused?	—		—	V	
34.	Did all members who participated in proceedings in revision vote on original findings and sentence?	—	—	—	—	—
35.	At proceedings in revision are the trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, the accused, and the individual counsel, if any, accounted for as present or absent?	—	—	—	—	—
36.	Is the record properly authenticated?	V		V		
(37.)	Is action of reviewing authority properly entered in record and signed?	—	—	V		
38.	In case of adjournment or continuance, are each day's proceedings properly signed by trial judge advocate?	V		V		
39.	After each adjournment during trial, is presence or absence of members of court, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, accused, his individual counsel, and the reporter properly accounted for?	V		V		

	Trial J. A. Yes	Trial J. A. No	Staff J. A. Yes	Staff J. A. No	J. A. G. O. Yes	J. A. G. O. No
(40.) Is the action of the reviewing authority legal and properly taken?						
41. Is clemency recommended?						

HARLEY J. MCNEAL 12 Sept. 1944
Trial Judge Advocate. (Date)
Cap't JAGD

RICHARD J. KENT, Capt., JAGD 20 Sept. 1944
Ass't. Staff Judge Advocate. (Date)

B. FRANKLIN RITER Legally Sufficient 9 Dec. 1944
Officer Reviewing Record. (Action) (Date)
Colonel JAGD

B. FRANKLIN RITER Legally Sufficient 9 Dec. 1944
Chief Examiner. (Action) (Date)

B. FRANKLIN RITER
Colonel JAGD
Chairman, Board of Review

NOTE.—Questions 13, 17, 18, 19, 21, 30, 33, 37, and 40 not to be answered by the trial judge advocate. Question 40 not to be answered by the staff judge advocate.

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RECORD OF TRIAL BY GENERAL COURT-MARTIAL of Smith, Bernard W., 32286877, Pvt, Hq. Det. 353rd Fighter Group

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EXHIBITS

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The carbon copy of the record of trial (less the exhibits) furnished to the accused, per his receipt below.

HJMcN.
(Initials, TJA)

RECEIPT FOR COPY OF RECORD

I hereby acknowledge receipt of a carbon copy of the above described record of trial, delivered to me at AAF Station F-157 this 8 day of September 1944.

BERNARD W. SMITH
BERNARD W. SMITH
(Signature of the accused)

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RESTRICTED

PROCEEDINGS OF A GENERAL COURT-MARTIAL WHICH CONVENED AT HEADQUARTERS VIII FIGHTER COMMAND PURSUANT TO THE FOLLOWING ORDER.
SPECIAL ORDERS NUMBER 195 APO 637 AAF STATION F-341
9 August 1944

EXTRACT

1. A General Court-Martial is appointed to meet at or in the immediate vicinity of AAF Sta F-157, or at such other places as may be designated by the President thereof, at

1000 hours, 10 August 1944, or as soon thereafter as practicable, for the trial of the case of United States vs Pvt Bernard W. Smith, Hq., 353rd Ftr. Gp., only.

DETAIL FOR THE COURT

Col. Donald P. Graul, 017557, Sig C
Lt Col Wesley W. Harting, 0485609, CE
Maj Hugh B. Speir, 0485137, AC
Maj Ceylon B. Frazer, 0512575, GSC, Law Member
Maj Aaron J. Yauger, 0177735, AC
Maj Charles T. Bruett, 0905620, AC
Maj Noble H. Hodge, 0430731, AC
Capt James C. Cope, 0419592, MC
Capt John B. Rose, Jr., 024960, AC
Capt William S. Woolsey, 0855845, AC
Capt Harley J. McNeal, 0914222, JAGD, Trial Judge Advocate
1st Lt Alan B. Todd, 01287269, Inf, Asst Trial Judge Advocate
Capt William Kapelman, 0565805, AC, Defense Counsel
1st Lt Frederick M. Crollard, Jr., 0562787, AC, Asst. Defense Counsel

By command of Brigadier General GRISWOLD:

BENJAMIN J. WEBSTER,
Colonel, AC,
Acting Chief of Staff.

OFFICIAL:
JOHN J. SAILORS,
Colonel, AGD,
Adjutant General.

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RESTRICTED

Note to Reporter: Read carefully all footnotes and Instructions on back of Cover Sheet.

If extensive alterations of the printed form are required to make mark the truth, use a plain sheet of paper and type what actually occurred, using the form as a model to the extent it is applicable.

(LEAVE THIS SPACE ABOVE THIS LINE FOR BINDING)

HQ., VIII FIGHTER COMMAND
AAF STATION F-157,
25 August, 1944

The court met pursuant to the foregoing orders at 10:00 o'clock, A. M.,

PRESENT

Col Donald P. Graul, 017557, Sig C,
Lt Col Wesley W. Harting, 0485609, CE
Maj Hugh B. Speir, 0485137, AC
Maj Ceylon B. Frazer, 0512575, GSC, Law Member
Maj Charles T. Bruett, 0905620, AC
Maj Noble H. Hodge, 0430731, AC
Capt James C. Cope, 0419592, MC
Capt John B. Rose, Jr., 024960, AC
Capt William S. Woolsey, 0855845, AC
Capt Harley J. McNeal, 0914222, JAGD, Trial Judge Advocate
1st Lt Alan B. Todd, ~~01287269, Inf~~, Asst Trial Judge Advocate
Capt William Kapelman, 0565805 AC, Defense Counsel
1st Lt. Frederick M. Crollard, Jr. 0562787, AC, Asst Defense Counsel

ABSENT

Maj Aaron J. Yauger, 0177735, AC—Transferred from station, (per paragraph 4, SO 198, Hq, VIII Fighter Command, dated 12 August 1944.)

Note: Be sure that all the personnel of the court, including the trial judge advocate and defense counsel and their assistants, are accounted for as either present or absent.

After the name of each absentee state the reason for his absence, or enter the remark "reason unknown."

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Note to Reporter: Read carefully all footnotes, and Instructions on back of Cover Sheet.

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(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

The Court proceeded to the trial of

(Last name)	(First name and middle initial)	(Army Serial No.)	(Rank)	(Organization)
Smith	Bernard W.	32286877	Pvt, Hq. Det.	353rd Ftr. Grp.

who appeared before the court and was given the opportunity to introduce civil or military counsel of his own selection.

INTRODUCTION OF COUNSEL (By the accused)

Associate ~~Individual~~ Counsel introduced: 2nd Lt. Harry Lieberman, O-1551668.

Defense Counsel of the Court: services desired.

Assistant Defense Counsel: services desired.

REPORTER SWORN

Verna E. Newman, Cpl, WAC, A-217665 was sworn as reporter.

The accused was then asked if he wanted a copy of the record of trial, to which he replied that he did.

The trial judge advocate then announced the names of the members of the court present and absent and the names of the accuser,[4] the investigating officer,[5] officers who forwarded the charges[6] and members of the court who would be called as witnesses for the prosecution.[7]

T. J. A. No member of the court will be called as a witness for the Prosecution.

Prosecution: ~~If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member it is requested that he state such facts.~~

~~Challenges by the Prosecution~~:

~~Prosecution (to accused): You now have the right to challenge any member or members of the court for cause, and any one member, other than the law member, peremptorily.~~

~~Challenges by the Defense~~:

131 LAW MEMBER. Private Smith, you understand, you are charged with a serious offense, involving a possible death penalty. Have you had ample time to confer with Counsel
(HJM) your Defense and with Lt. Lieberman?

ACCUSED. Yes, sir.

LAW MEMBER. You are satisfied to proceed with the trial at this time?

[4] Enter after the colon "None," or names of individual counsel introduced.

[5] Enter in the blank "are" or "not" as indicated by the accused. In a proper case add "as associate counsel," "excused and withdrew," "absent," or other appropriate remark.

[6] Complete by adding either a period or the word "not."

[7] If a member of the court, the record should show further, as to each, whether he was excused and withdrew.

[8] Enter after the colon "None," or, in accordance with the facts, "The (prosecution) (defense) challenges (for cause) (peremptorily) * * * (Captain * * *)." Use additional sheets, as necessary, to record full proceedings on challenges, showing in each case whether the challenged member was excused and withdrew.

ACCUSED. Yes, sir.

LAW MEMBER. You are satisfied you have had sufficient time to confer with your counsel to sufficiently try your case?

ACCUSED. Yes, sir.

T. J. A. I will now comply with Military Justice Circular #1, dated 1 January 1944, issued by the Branch Office of The Judge Advocate General with the European Theater of Operations. It is my duty to test the court to ascertain whether any members of the court have any scruples against sentencing the accused to death if he is found guilty and to challenge for cause any members of the court who have such scruples. I will now read to the court the appropriate paragraphs as recommended by the Assistant Judge Advocate General, European Theater of Operations:

"If any member of the court has scruples which would prevent him from voting for a sentence to death on the conviction of accused of the capital offense or offenses mentioned, regardless of the evidence of the aggravated nature of the crime, he is enjoined to so state at this time.

The foregoing is not meant to suggest to a court what punishment it should adjudge in any case or for any type of offense. That is their duty, to be performed under oath 'to well and truly try and determine, according to the evidence', (HJM) and to 'duly administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States * * *."

I will now ask the court whether any member has scruples which would prevent him from voting for a sentence of death as I have stated heretofore?

PRESIDENT OF COURT. There appear to be none.

PROSECUTION. If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member it is requested that he state such facts.

President of COURT. There appear to be none.

CHALLENGES BY THE PROSECUTION:

T. J. A.: Prosecution has no challenges for cause or peremptorily.

HJMcN DPG PROSECUTION. (to accused). You now have the right to h

challenge any member or members of the court for cause, and any one member, other the law member, peremptorily.

132 CHALLENGES BY THE DEFENSE:

DEFENSE. Defense desires to challenge Major Speir for cause, by reason of the fact he sat on another case involving the accused. Is that a fact, sir?

Major SPEIR. I am not at all sure.

Law MEMBER. That would not be an automatic disqualification unless the sitting on the case had caused him to form some opinion about the charge here, or about the accused.

DEFENSE. It would reveal a holding by a previous court, or a possible conviction for a crime I am not permitted to state now. As one of the members, he would know whether or not he was so convicted.

Law MEMBER. Every court martial sentence is published, publicly I assume and he probably would not know by reason of sitting on the court facts that might not be known to other members of the court. I think, however, the court will have no objection to Major Speir being excused providing both the Prosecution and Defense agree to it.

T. J. A.: I think, in fairness to Major Speir, if he has not formed an opinion as to Pvt. Smith's guilt or innocence in the case, he should be allowed to sit. If the Defense desired to inquire of Major Speir, I think that is his right, or if Major Speir desires to make a statement as to whether or not he might be prejudiced.

DEFENSE. It was just our feeling in the matter that Major Speir had sat previously and we desired to challenge him for cause.

Law MEMBER. (to accused). Do you desire to cross-examine Major Speir as to any opinion he may have formed?

ACCUSED. No, sir.

In view of the fact that Defense Counsel had no definite reason for challenging Major Speir for cause, the President of the Court polled the court in the absence of Major Speir and announced that the challenge for cause as to Major Speir was not sustained. Major Speir thereupon resumed his seat.

DEFENSE. Accused desires to challenge Major Speir peremptorily.

Major Speir was then excused and withdrew from the room.

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LEAVE THE SPACE ABOVE THIS LINE FOR BINDING

The accused was asked if he objected to any member of the court remaining present, to which he replied in the negative.

COURT AND PROSECUTION SWORN

The members of the court and the personnel of the prosecution were then sworn.

ARRAIGNMENT

The accused was then arraigned upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group, did at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July 1944 forcibly and feloniously, against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages Station Road, Lawford, Essex.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group, did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz, rape, commit an assault upon Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.

(Signature of accuser)[1] ERNEST P. MACGREGOR.
(Name typed)[1] ERNEST P. MACGREGOR.
Captain, AC.
Hq. Det. 353rd Fighter Group.
(Grade, organization, or branch)

[1] Both the signature and the name typed thereunder are copied (typed) into the record, as they appear on the Charge Sheet. This applies likewise to signatures on the following page.

Hq. S OS 2-43 10M 6308

Note to Reporter — Read carefully all footnotes and instructions on back of Cover Sheet.

If extensive alterations of the printed form required to indicate the truth, use a plain sheet of paper and type what actually occurred, using the form as a model to the extent that it is applicable.

(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 19th day of July, 1944, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he * * * has investigated the matters set forth in the specification of Charge I and Charge I and specification of Charge II and Charge II and that the same are true in fact, to the best of his knowledge and belief.

(Signature) RALPH JOHNSON.
(Name typed) .....
(Grade and organization) *Capt AC.*
(Character in which oath was administered) *Adjutant* AAF Station F-157.

1ST IND.

Headquarters VIII FIGHTER COMMAND, AAF STATION F-341, APO 637 9 August, 1944

Referred for trial to Capt. Harley J. McNeal, trial judge advocate of the general court-martial appointed by paragraph 4, Special Orders No. 195, Hq, VIII Fighter Command, 9 August, 1944.

By Command of BRIGADIER GENERAL GRISWOLD:
(Signature) W. T. DURKOP.
(Name typed) W. T. DURKOP.
(Grade and organization) *Major AGD.*
Asst Adj Gen

SPECIAL PLEAS AND MOTIONS[1]: None

PLEAS TO THE GENERAL ISSUE[2]:

To the Specification, Charge I —Not Guilty
To Charge I —Not Guilty
To the Specification, Charge II—Not Guilty
To Charge II —Not Guilty

READINGS FROM LEGAL AUTHORITIES[3]:

The Court desired the following readings from the Manual of Courts-Martial and the T. J. A. read them. Page 165, paragraph b. "Rape"; also Page 179 "Assault with intent to commit rape."

The trial judge advocate made an opening statement to the court.

DEFENSE: At this time I should like the Law member to caution the court that all that was said by the Counsel for the Government is merely what he intends to prove and is not to be taken as any evidence in the matter
135 whatever. I believe the T. J. A. over-exerted himself in that matters in which there is any question as to the admissibility of evidence is not to be discussed by him in the opening remarks, but I did not desire to interrupt his statement.

Law MEMBER. The court will recognize, of course, that the statement made by the Trial Judge Advocate is merely his

---

[1] If "None," so state. If any special pleas or motions are made, the record will show the proceedings and action thereon. The printed matter following (PLEAS TO THE GENERAL ISSUE, etc.) will in that case be stricken out and typed into the record after such proceedings.

[2] If the accused pleads not guilty throughout, enter "Not Guilty to all specifications and charges." Otherwise the plea made to each specification and charge must be stated separately; and the record will continue (in accord with the facts): "(The President) (The law member) (The defense counsel stated that he had) explained to the accused the meaning and effect of (the) (each) plea of guilty." Do not record the words of such explanation (if made in court), but indicate fully any response made by the accused, either in his own words, or (*e.g.*, if his response is "yes" or "no" to questions asked) in substance; for example: "The accused stated that he understood and that he wished his plea of guilty to stand."

[3] If "None," so state. Otherwise give the citation of each reading, indicating the pages or paragraphs read, and whether it was offered by the prosecution or defense, or ordered by the court. Do not copy the text of the readings into the record.

Enter "an" or "no." Do not record the opening statement (if any) unless directed to do so by the court, or unless necessary to understand proceedings which follow. In case of an objection or question concerning the opening statement, the proceedings and action thereon will be recorded.

statement of what he intends to prove and is not evidence in any sense and has no probative value whatever.

DEFENSE. Very well.

DALE, SHEILA WINIFRED, Victoria Cottages, Manning Tree, Essex, a civilian, a witness for the Prosecution, was sworn and testified as follows.

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?
A. Sheila Winifred Dale.
Q. Where do you live?
A. Victoria Cottages, Manning Tree, Essex.
Q. That, of course, is here in England?
A. Yes.
Q. How old are you?
A. 20.
Q. Are you working at the present time?
A. Not at the moment, no.
Q. Where did you work?
A. Brantham BX Plastics.
Q. How much do you weigh?
DEFENSE. Objected to as incompetent.
LAW MEMBER. Objection overruled.
WITNESS. 8 stone.
PROSECUTION. How many pounds in a stone?
A. 14.
Q. Calling your attention to the date of 11 July 1944, at about 10:30 P. M. that night, where were you?
136 A. We were just about leaving home.
Q. When you say "we" whom do you mean?
A. My sister and two friends of ours.
Q. Where were you going?
A. Going to ride back to Bergholt.
Q. Did you, in fact, ride along the roadway?
A. Yes.
Q. Did there come a time when you stopped cycling along—
DEFENSE. I must object. I must ask the Prosecution not to lead this witness.
LAW MEMBER. Objection is sustained.
PROSECUTION. Where did you go, Miss Dale?
A. I went as far as Bergholt.
Q. What did you do there?
A. I stopped for about 10 minutes.

Q. Then what happened?

A. My sister called to me and said she was going home and my friend—we walked back to where she was—it was about 50 to 75 yards away—she wasn't there. We thought probably she was waiting at the bottom of the hill. The friend with me wanted to ride to the corner but I said I would be all right and I would soon catch up. So I went on alone.

Q. Where did you go?

A. I rode down to the bottom of the hill, toward Manning Tree and when I got to the bottom of the hill I saw it was getting dark and realized it was lighting up time and as I didn't have any lights on my bicycle I started to walk.

Q. Approximately what time was it then?

A. It must have been just after 11.

Q. As you were walking along, did anything happen there?

A. I was walking along for about 400 yards just by the mill at the bottom of the hill, between those houses and the Bucks Horns and saw a light coming toward me.

Q. What next happened?

A. When it got close to me, I saw it was an American soldier. He shouted out: "Hello, there".

137 DEFENSE. I ask that the Prosecution fix the time.

PROSECUTION. At approximately what time was this?

A. It must have been about 5 or 10 minutes past 11.

Q. What did you say the American said?

A. He said: "Hello, there".

Q. What, if anything, did you say?

A. I didn't answer.

Q. What next happened?

A. I saw he was turning his cycle around, so I got on my bicycle and rode fast.

Q. Then what happened?

A. Soon he caught up with me and rode in front of my wheel and I had to get off.

Q. Where was this?

A. On the left side of the road before you get to the Bucks Horns.

Q. Where is the Bucks Horns located?

A. In Brantham.

Q. You were going where at this time?

A. Going home to Manning Tree.

Q. Approximately how far is Manning Tree from Brantham?

A. One mile.

Q. When the American rode in front of your cycle what happened?

A. I had to get off. He put his hand on my handle bar and wanted me to stop. I let him see I didn't want to have anything to do with him. I got around the side of my bike and got on my bike again. Two Americans came along and he shouted something to them but I don't know what it was.

Q. Approximately what time was that?

A. 20 minutes past 11.

Q. What happened to the two Americans?

A. They just rode by.

Q. What did you then do?

A. I continued to cycle.

Q. Where was this American?

138 A. He was cycling along beside me.

Q. As you cycled along, did anything happen after that?

A. He was talking to me; I didn't answer. He wanted to see me home and I told him I didn't want him to.

Q. How far along the roadway did you get before anything unusual happened?

A. I don't understand you?

Q. Did anything happen between you and the American after you said you didn't want him to go home with you?

A. Not until we came to the short cut road from Bratham to Manning Tree. He suggested we go there.

Q. Describe this short cut for the court.

A. It is only a short pathway leading along by the river. It is shorter than by the road and very lonely.

Q. Is there anything near this short cut that you can identify or fix for the members of the court? Any object there?

A. There are some white bridges. It is right close to the bridges.

Q. How many bridges were there from Brantham to Manning Tree on the road you were traveling along?

A. Two.

Q. Near which bridge is this pathway or short cut, as you are going toward Manning Tree?

A. The second one.

Q. He asked you to go down this short cut?

A. Yes.

Q. What did you reply?

A. I told him I didn't live nowhere near that.

Q. What did you do then?
A. I started cycling, or rather continued cycling.
Q. How far along did you cycle?
A. About 100 yards.
Q. Then what, if anything, happened?
A. He got hold of my handle bars and shook it. He said: "You have got to stop here whether you like it or not".
Q. What happened to you?
A. I fell off my cycle.
139 Q. What time was this?
A. About 23 minutes past 11, I think.
Q. Did you fall off the bicycle?
A. Yes.
Q. When you fell off, what, if anything, did the American do?
A. He dropped his own bicycle and snatched mine away.
Q. What did he do with it?
A. Threw it on the wide grassy path.
Q. What did you do?
A. I ran away.
Q. What did the American do?
A. He ran after me.
Q. About how far did you run?
A. I can't say exactly. Not very far. I was nervous and lost the strength of my legs.
DEFENSE. Objected to.
LAW MEMBER. Objection overruled.
PROSECUTION. What happened then as you ran along?
A. He caught me up and dragged me to where his own cycle was lying in the road.
Q. How did he catch you?
A. From the back.
Q. How did he get his arms about you?
A. Around the top of my arms. I couldn't move them.
Q. What happened when he dragged you back?
A. He picked up his own cycle and threw it with mine. I got away again.
Q. What did you do then?
A. I ran away again.
Q. What happened as to the American?
A. Just the same thing. He ran after me and dragged me back.
Q. When he dragged you back the second time, what happened then?

140 A. He dragged me over on to this grassy path.

Q. About how far over on that path did he drag you?

A. I am not a very good judge of that.

Q. Can you give the court some idea in feet?

A. It was in the middle of this grassy path. It was very long grass.

Q. Looking at this bench in front of the court, would it be approximately that distance he dragged you? (Indicating approximately 8 or 10 feet.)

A. Yes, it would be.

Q. When he dragged you into this long grass, did he say anything?

A. No.

Q. What did he do to you when he dragged you into the grass?

A. He started pulling me down.

Q. Can you tell the court approximately what time this was?

A. It must have been about half past 11.

Q. Where was the place you were dragged into with relation to the second bridge you have already described to the court?

A. It was about 100 yards away from the bridge.

Q. Are there any houses in the vicinity there?

A. Yes, one. It stands back from the road on the right hand side.

Q. Do you know the name of that house?

A. An old lady lives there.

Q. Do you know what the cottage is called?

A. No, I don't.

Q. Are there any other houses along there?

A. No.

Q. How far beyond this particular house was it you were dragged into the long grass, as you recall?

A. On the opposite side of the road, and about 25 or 30 yards away—maybe more.

Q. When he dragged you into the long grass, what if anything happened?

A. I started making excuses—I said he would spoil my clothes and my father would come along in a minute
141 that I had to get up early in the morning—He didn't take any notice. He started taking his coat off.

Q. What next happened?

A. He got me on the ground and I started to scream.

Q. When you started to scream, what, if anything, did the American do?

A. Nothing the first time I screamed. When I screamed more, he started putting his hands on my throat and said if I didn't stop screaming, he would murder me.

Q. What did you do?

A. I didn't scream any more.

Q. Why?

A. I was so frightened of him.

Q. After that, what did he do?

A. He started pulling my clothes up.

Q. What did you do?

A. I started struggling.

Q. Tell the court how.

A. I was kicking my legs, and trying to push him off with my hands.

Q. What next occurred?

A. He finally did get my clothes up and I started taking my knickers off. I was kicking and struggling but he did get them off.

Q. What did he do with the knickers?

A. I don't remember.

Q. After he got your knickers off what next happened?

A. He laid on one of my legs and started pushing the other one apart with his hand.

Q. Which leg was he laying on?

A. On my right leg.

Q. What happened at this time? What were you doing?

A. Trying to push him off all the time.

Q. What part of his body was on your leg?

A. His chest.

Q. Where were his feet?

142 A. Well—

Q. With relation to your body?

A. His head was in my lap.

Q. As to your body, would his feet be along parallel with your body or at right angles to your body?

A. At right angles.

Q. When he was pushing your leg apart from your right leg, what next did you do, if anything?

A. I wanted to scream again; I think I did. I knew he put his hand over my mouth. I tried to push his hand away and then he got my leg apart and he started sucking me.

Q. Did you feel anything when you say he started sucking?

A. No.

Q. Did you feel any part of his person?

A. I felt his tongue.

Q. How long did this go on?

A. I couldn't say; it seemed ages to me but I should say about two or three minutes.

Q. What were you doing?

A. Trying to raise myself up to see if anybody was coming along the road, but he kept pushing me down again.

Q. After the two or three minutes elapsed, what next occurred?

A. He threw himself on top of me. He pulled my clothes up more and put his person in mine.

Q. When you say "person" do you mean his penis?

A. Yes.

Q. What if anything did you feel then?

A. I was too scared. I didn't dare to scream.

Q. Did you feel his penis in your private part?

A. Yes.

Q. How long did he keep his penis in your private part?

A. I couldn't say exactly. I should say 4 or 5 minutes.

Q. What was he doing while he had his penis in your private part?

143 A. Moving up and down, breathing very hard and using terrible swear words to himself.

Q. What was he saying?

A. Couldn't I write it down?

Q. Just say it once for the court. The members of the court will understand.

A. He said: "fucking" and "lovely cunt."

Q. After he moved up and down on you for three or four minutes, what next happened?

A. I tried to raise myself up and couldn't see anybody coming.

Q. At this time what was your condition?

A. I was very wet when he got off me.

Q. Where did you feel the wet?

A. On top of my legs and in my private.

Q. When he got off you, what happened?

A. I started making excuses, I wanted to get home.

Q. Did he do anything with your knickers?

A. He threw them at me and said: "You had better put these on again."

Q. What time was this?

A. I should say about a quarter to 12.

Q. Can you describe your condition to the court at that time after you had felt this wet? How did you feel? From the time he dragged you into this long grass, as I understand it you had been struggling with him. Is that right?

A. Yes.

Q. How did you feel after you felt this wet?

A. I was so nervous. I didn't have actually any strength in my body.

Q. As soon as the soldier got up and went away from you what did you do?

A. I put my knickers on and asked if he would get me my cycle.

Q. What happened then?

A. He did get it and brought it to me.

Q. What did you do?

144 A. He wanted to see me another night he said.

Q. What, if anything, did you say?

A. I was all for it because I wanted to get away. I thought if I said I would he would let me go. He said he wanted to meet me on Thursday night at 7 o'clock. First he said at the white bridge, then he said: "No, make it the other bridge, the one near the Bucks Horns." I said: "I will." He said: "I don't believe you will."

Q. Why did you say you would meet him?

A. I wanted to get away and get home. I was frightened that he would start everything all over again.

Q. What happened after you said you would meet him?

McN G

A. He wanted to kiss me good night and I think he did manage to. I let him. I saw he was getting mad again, so I let him do it to get away.

Q. Were you frightened at that time?

A. Yes.

Q. Where did you go?

A. Home.

Q. About what time was it you got home?

A. I should imagine 12 o'clock.

Q. What did you do when you got home?

A. I went around by the stairs and called my mother. I was crying.

Q. Can you describe the American you have talked about?

A. Yes. He has a roundish face, fair hair; there is a tooth missing on the left side and I think his other teeth are widely spaced.

Q. I ask you, Miss Dale, to look around the court room and point out if you can any man or the man about whom you were talking and about whom you related to the court performed the acts you have related?

A. The man over there.

Q. Where is he seated?

A. The second one. (Indicating the accused.)

Q. Sheila, is that the man you are talking about who performed the acts on you?

A. Yes.

Q. After you got home and complained to your mother, what did you do?

145 A. Mother came down and I don't remember what I said exactly. I said I had been attacked by a sexual maniac and that if I didn't give in to him, he would kill me.

Q. Did you see any doctor after that?

A. The next morning.

Q. That night when you came home, what did you do?

A. After Mother got down, my sister came down. I don't remember much. I was hysterical.

Q. After you talked with your sister and mother, what did you do?

A. I had a hot bath.

Q. And the next morning you went to a doctor?

A. Yes.

Q. After the 11th of July, did you see the accused again.

A. Yes, I believe it was six days after.

Q. Where did you see him?

A. Up here at an identity parade.

Q. When you talked with your mother and sister, did anyone else come in?

A. I think my sister went to fetch a soldier.

Q. Do you know the soldier's name?

A. I know him as Bill.

PROSECUTION. I hand you what has been marked as Prosecution's Exhibit 1 and ask you, can you identify that exhibit?

A. Yes, that is my skirt.

Q. How can you tell?

A. I know it is mine; that is all.

Q. Is there anything on it that you know it is yours?

A. There should be a mark on it. Here it is.

Q. What kind of mark is it?

A wet mark that

HJMcN 1971 A. I found it on my skirt when I got home that night.

Q. When was the last time you saw this skirt?

146 A. The next morning when I went to the doctor's.

Q. Did you give the skirt to anyone?

A. Yes, the policeman there—Mr. Felton.

Q. I hand you what has been marked Prosecution's Exhibit 2 and ask you if you can identify it.

A. Yes. It is a pair of knickers—my knickers.

Q. Was there anything on the knickers you discovered when you got home?

A. Yes, the same as on my skirt.

Q. What do you mean by that?

A. The discharge.

Q. Where was that, Sheila?

A. Right here. (Indicating the fork of the knickers.)

PROSECUTION. I ask leave to introduce these into evidence as Prosecution's Exhibits 1 and 2 and ask leave to withdraw them at the conclusion of the trial and substitute a reasonable description therefor.

PROSECUTION. Can you indicate to the court which is the front and back of your skirt?

The witness indicated the front as the portion with the pleats.

PROSECUTION. Where was the stain or the "wet" you described? In the back or the front?

WITNESS. I think it was the back.

DEFENSE. No objection.

LAW MEMBER. The clothing identified by the witness will be admitted into evidence as Prosecution's Exhibits 1 and 2.

PROSECUTION. I ask leave to withdraw them at the conclusion of the trial and substitute a reasonable description.

DEFENSE. No objection.

LAW MEMBER. That may be done.

Cross Examination.

Questions by DEFENSE.

Q. Miss Dale, on the night of July 11th, what time did you reach home for the first time?

A. I reached home about a quarter to nine that night.

147 Q. When you came home did you find anybody there?

A. My mother and my sister.

Q. What did you do then?

A. I had tea. I had an appointment that night but I arrived home late.

Q. What time did you have this appointment?

A. About 7:30 or 8.

Q. Whom did you have this appointment with?

A. A friend of mine—Kentucky.

Q. Do you know his correct name?

A. Raymond Eaves.

Q. Is he a member of the U. S. armed forces?

A. Yes.

Q. When you arrived home, was he there?

A. No.

Q. What happened at a quarter to 9 after you had your tea?

A. About a quarter past 9 my sister came in with Kentucky and California.

Q. What did you do then?

A. We stayed in the house until about 10:30.

Q. What were you doing then?

A. Talking—listening to the wireless.

Q. You had occasion at that time to pair off with Kentucky?

PROSECUTION. I am going to object. I don't see that it is in

HJMcN DPG relevant to the issues ~~of~~ this case whether she paired off.

LAW MEMBER. Objection overruled.

DEFENSE. Did you have occasion to pair off—two of you going into one room and the other two in another?

A. We all kept together.

Q. Until what time?

A. I would say 10:30.

Q. What happened then?

A. They asked us to ride back, which we did.

148 Q. To where?

A. Bergholt.

Q. How far did you ride?

A. We walked up the hill. We rode until we got to the hill.

Q. About what time did you reach that hill?

A. About a quarter or 10 until 11.

Q. Did you stop at the top of the hill?

A. Yes, we did.

Q. Did the four of you remain together?

A. No, my sister and her partner stopped and we walked on. I knew my sister would call me when she was going.

Q. How was it the four of you didn't remain together. Why did you walk off with Kentucky?

A. Nothing at all.

Q. You walked off with him and told your sister you were going to walk down the road?

A. No. They were walking in front and we in behind.

Q. You knew they had stopped?

A. Yes.

Q. But you continued walking up the road about 50 yards?

A. Yes.

Q. You stopped there in the road?

A. Just off to the side.

Q. Is it a straight road?

A. Yes.

Q. From where you were standing were you able to see your sister and the other soldier?

A. No.

Q. They couldn't see you either?

A. No.

Q. What did you say to Pam when you were down there, 50 yards away? Did you shout to her and tell her anything?

149 A. No.

Q. Did you tell her to call you when she was about to leave?

A. No; I knew she would.

Q. Did Kentucky have his bicycle with him?

A. Yes.

Q. Did you stand in the road with him?

A. Beside the road.

Q. Did you ride your bicycles further?

A. No.

Q. How long did you stay there?

A. About 10 minutes.

Q. About what time was that?

A. 11 o'clock. Then I heard my sister call.

Q. What did she say?

A. "Are you coming? I am going." I didn't answer. We started to walk back to where she was and we saw California riding by and I knew he had left her.

Q. Why didn't you answer? Were you preoccupied for the moment?

A. No, just talking?

Q. Did you have occasion to kiss Kentucky at that time?
A. No, I didn't.
Q. Did you kiss him at all?
A. I kissed him that night.
Q. When he left, did he kiss you?
A. Yes.
Q. Did he hold you tight?
PROSECUTION. Objection.
DEFENSE. It is possible the seminal fluid might be from someone other than the accused.
PROSECUTION. I ask that be stricken.
LAW MEMBER. Of course, the court understands the statement is not proof. Objection overruled.
DEFENSE. When you kissed Kentucky, did he hold you tight?
150 A. No, because the cycle was in between.
Q. Did he just lean across the bicycle and put his lips out and you kissed him?
A. Yes.
Q. He didn't put his hands on you at all?
A. No.
Q. It was what you would call a brotherly kiss?
A. Yes.
Q. Was that the only kiss that took place during the 10 minute period you were together?
A. Yes.
Q. This was at the end of the 10 minute period?
A. Yes.
Q. Then you started walking back toward where Pam was?
A. Yes.
Q. When you started back towards Pam, California came riding by. Kentucky was still with you, wasn't he?
A. California just rode right by—yes.
Q. He didn't stop and wait for Kentucky?
A. No.
Q. Did Kentucky say anything to him?
A. No.
Q. Did Kentucky continue walking back with you?
A. Yes.
Q. You weren't walking at that time—you were standing still.
A. We were walking.
Q. How far from the point you had originally gone to with Kentucky did you walk back when you saw California?

A. Not very far.

Q. Was it 400 yards?

A. No.

Q. 5 yards?

151 A. About that.

Q. How much farther did Kentucky walk with you?

A. To the top of the hill.

Q. When you got to the top of the hill what happened then?

A. I see Pam wasn't standing there so I thought she would be riding slowly and I would catch her up. He wanted to come with me as he didn't want me to ride back alone.

Q. About what time was this?

A. 5 after 11.

Q. He kissed you again and you went on?

A. Yes.

Q. There were two kisses occurred during that period—not one?

A. Yes.

Q. Did he sit on his cycle and you on yours and kiss you that fashion?

A. No, the cycle was between.

Q. He leaned across that and kissed you?

A. Yes.

Q. Then you continued on your way and he turned about and went back in the direction California had gone?

A. Yes.

Q. He didn't put his arms about you?

A. No.

Q. Did he put his arms about you at all during the entire evening?

A. No.

Q. Why was it you walked down the road with Kentucky? Why didn't you stay back with California and Pam?

A. I don't see there is any harm in walking in front of my sister.

Q. Why was it necessary for you to be alone?

PROSECUTION. Objection. He is merely arguing with the witness.

LAW MEMBER. Objection is sustained. That is argumentative.

DEFENSE: About what time was it you were at the top of the hill and Kentucky had just left you?

A. It was 5 past 11.

152 Q. What did you do then?

A. I started down to the bottom of the hill.

Q. How far did you go do you think?
A. About 100 or 150 yards.
Q. What did you see?
A. I saw it was getting dark and got my bicycle and started to walk.
Q. Did you have a lamp on your cycle?
A. No.
Q. What time was this?
A. About a minute or two after that.
Defense. I think the court should instruct the witness I think we can do without some of the facial expressions.
Law Member. That is something the court cannot control.
Defense. What time was it you first met this defendant?
A. I imagine at 10 past 11.
Q. How dark was it?
A. It was getting pretty dark.
Q. Didn't you say "Hello, Yank" when you saw him?
A. No.
Q. What did he say to you?
A. "Hello, there."
Q. What did you say?
A. I never answered.
Q. Did you get on your bicycle and try to get away?
A. Yes.
Q. You knew you weren't supposed to ride a bicycle after dark if you had no lights?
A. Yes.
Q. Did he say anything nasty to you at that time—say he had evil intentions?
A. No, he didn't; he just wanted me to stop. I didn't want anything to do with him.
153 Q. Hadn't you ever spoken to Yanks before?
A. Yes.
Q. Hadn't you ever met Yanks informally before, in that fashion?
A. No.
Q. Every one you met—you never met a Yank in the street and talked to him?
A. No.
Q. Neither have Yanks ever come to your home that you didn't know?
A. No.
Prosecution. I feel that unless Defense Counsel intends to connect this up he is merely on a fishing expedition and is taking the time of the court on something purely captious I think this matter is entirely irrelevant.

Law Member. The court does not see any particular relevance at the present time but on the other hand in the discretion of the court, you are authorized to proceed as you were.

Defense. Had you ever seen this defendant before 11:30 that evening?

A. Never.

Q. Never see him at any pub?

A. Never.

Q. Nor at the Bucks Horns?

A. Never.

Q. Never saw him along the road?

A. Never.

Q. When he came over to you, describe his condition. Did he appear to you to be drunk?

A. I didn't take that much notice. I didn't even look at him.

Q. You mean you were scared just as soon as you saw him?

A. Yes. When he started following me.

Q. When he asked if he could see you home?

A. I was all alone; there was nobody else. I was scared.

Q. You had never seen him before?

A. No.

Q. What did he do then?

A. He rode in front of my front wheel and I had to get off. He put his hand on mine—on my handle bars—
151 and wanted me to stop. I pulled myself away and—

Q. Did he say anything to you at that time?

A. He did say something. I didn't take notice.

Q. Isn't it a fact he asked to see you home?

A. Later on, yes.

Q. When you got back on your cycle and started to pedal off did you pedal quickly?

A. Yes.

Q. What did he do?

A. Caught up to me again.

Q. What happened then?

A. He asked me where I lived. I said: "Not far." He said: "Manning Tree?" and I said: "Yes."

Q. About how long did he continue to cycle along with you after he caught up again?

A. About 2 minutes. I thought Mother would be worried after Pam had got home.

Q. When you cycled along then, did he try to carry on a conversation with you?

A. Yes.

Q. What did he talk about?

A. I don't know. I was hoping there would be a policeman waiting on the corner, as there usually is, so he could see me home.

Q. When you got to the corner was anybody there?

A. No.

Q. Any American soldiers?

A. Just before we got to the corner, two American soldiers were coming toward us.

Q. Did you shout to the American soldiers?

A. No.

Q. You were trying to pedal away from this boy at the time?

A. Yes.

Q. When you got to the corner, you didn't see any constable or American M.P.?

155 A. No.

Q. What did the defendant do?

A. He continued to cycle.

Q. How long did you go?

A. Till he got me off the cycle.

Q. Tell the court what happened.

A. After we passed the short cut I started to cycle again and after about 100 or 150 yards he got hold of my handle bars and said: "You are going to stop here whether you like it or not" and shook my bicycle and I fell off.

Q. When you fell off the bicycle how far were you from the cottage you speak of?

A. It was on the opposite side of the road.

Q. How far?

A. About 50 to 75 yards.

Q. He threw you off the cycle and grasped hold of it?

A. He shook the handle bars so I fell off. He dropped his own cycle and pulled mine and threw it on the ground.

Q. Did he push you on the grass?

A. No, I ran away then.

Q. When you fell off the bicycle, where did you fall?

A. On the side of the road.

Q. Where was your bicycle?

A. I still held it with my one hand.

Q. You weren't free of the bicycle?

A. No.

Q. Where was his cycle when you fell on the side of the road?

A. He dropped that in the road.

Q. In the middle?

A. No, it fell as he got off, it fell toward the middle bu
wasn't actually in the middle of the road.

Q. Were you riding on the left side of the road?

A. Yes.

156 Q. What did he do then?

A. He dropped his own cycle and pulled mi
away from me and threw it on the grass.

Q. Did he throw it on to the grass on the left or rig
side of the road?

A. The left side.

Q. His cycle in the meantime was in the middle of th
road—did he get his cycle?

A. He dragged me back there.

Q. Did he hold with both his hands?

A. Yes.

Q. Then he let you go while he brought his bicycle back

A. When he lifted his cycle back, he used both hands.

Q. You were free for the moment?

A. Yes.

Q. Did you try to run toward the cottage?

A. No, I knew we were too far away.

Q. You started screaming?

A. Yes.

Q. Did you hit him?

A. No.

Q. You had already fallen to the ground before when h
pushed you from the bicycle?

A. Yes.

Q. What happened to your glasses?

A. I didn't hit my glasses and they didn't fall off—
they didn't fall right down.

Q. Your glasses didn't come off at all?

A. No.

Q. When he brought you back into this long grass, yo
struggled with him?

A. Yes.

Q. You were standing at that time?

A. Yes; I was making excuses too.

157 Q. Where were his arms?

A. Trying to push me down.

Q. Was he wrestling with you?

A. I suppose you would call it wrestling.

Q. Were both his arms around you?

A. Yes.

Q. Your glasses didn't come off?

A. No.

Q. Were those the glasses you were wearing at the time? (Indicating the glasses on the witness' nose.)

A. Yes.

Q. Did you wear those glasses when he forced you on to the ground?

A. Yes.

Q. Did they fall off then?

A. No.

Q. During the entire struggle which took place—during that 15 or 20 minutes—your glasses didn't fall off once?

A. No.

Q. He hit you in the face?

A. No.

Q. Where did he hit you?

A. Not at all.

Q. Did he strike you about the head?

A. No.

Q. When he forced you down he took your knickers off?

A. Not at first, no.

Q. What did he do?

A. Pulled my clothes up and I started screaming and he said he would murder me if I didn't stop screaming.

Q. Your knickers were still on?

158 A. Yes.

Q. What he do?

A. Then he got my knickers off.

Q. Did he put both hands about the elastic on the top and pull them down?

A. No, he didn't. I can't remember if he had one hand or two hands—how should I remember?

Q. You were wearing these at the time? (Indicating Prosecution's Exhibit 2.)

A. Yes.

Q. You don't remember whether he pulled them down with one hand or two hands?

A. No.

Q. Were you lying down at the time or standing up?

A. Lying on the ground.

Q. Was your head on the ground or were you sitting up in this fashion? (sitting on the desk)

A. Yes.

Q. You were looking for somebody?

A. Yes.

Q. And these were about your seat, weren't they?

A. Yes.

Q. You are trying to tell this court when you had [illegible] on, seated in this fashion, that boy was able to take [illegible] off?

A. No, he pushed my head down and after he threatened to murder me—

Q. Did you lift your hips for him so he could take the knickers off?

A. No.

Q. You kept yourself on the ground with these knickers on and this boy was trying to take them off you?

A. Yes.

Q. Were these knickers torn at all during the struggle?

A. I don't know.

Q. I show you these knickers and ask you are these knickers in the same condition now as they were on the evening you wore them?

159 A. Yes.

Q. Are there any tears on them?

A. Yes, there is.

Q. Where?

A. Here. (Indicating tear or slit seam in the fork).

PROSECUTION. I ask that the remarks of the Defense Counsel go out—about the seam—he said the split seam.

DEFENSE. What part of these knickers are now torn?

WITNESS. The seam is undone.

Q. There are no other tears on there?

A. No.

At this point the witness broke down and the court took a recess of 10 minutes at the end of which time the personnel of the court, prosecution and defense, and the accused and the reporter resumed their seats. The witness also resumed her seat.

DEFENSE. When he took the knickers off, he took them off both legs completely and threw them on the side of the road?

A. I don't know about that. I know he got them off.

Q. They were definitely off your person, weren't they?

A. Yes.

Q. When you made a statement to Mr. Felton, isn't it a fact you told him he only took the knickers off one leg?

A. I don't think so. I said I kicked and struggled and LJMcN OPG ~~when he threw them of me~~ I must have kicked them off completely.

Q. I show you a statement which you made to Mr. Felton and ask if this isn't so: "I struggled and screamed, but he managed to pull them off one leg." Is that correct?

A. No, that wasn't it at all. I don't remember.

Q. You don't know whether that was the statement you made?

A. I don't remember.

Q. I show you this statement and ask is this the statement you made to Mr. Felton?

A. Yes, it is.

DEFENSE. I ask that so much of it as makes reference to the knickers being taken off one leg be marked in evidence.

PROSECUTION. Her answer was she didn't remember whether she said that or not.

DEFENSE. She identified this statement and said it is the statement she made. I ask that that part of the statement be marked, for the credibility of the witness.

PROSECUTION. If he is going to offer part, he should offer it all, in fairness to the witness.

LAW MEMBER. I think it should be offered as a whole.

PROSECUTION. No objection.

LAW MEMBER. The statement will be received in evidence and marked Defense Exhibit A.

PROSECUTION. I might say the original is in the notebook of constable Felton. That is why the original is not here. It is a true copy of the original, insofar as I know.

LAW MEMBER. Will the accused agree that the copy may be introduced in evidence.

ACCUSED. Yes.

LAW MEMBER. It will be received in evidence.

DEFENSE. I should like to read from the statement: "I struggled and screamed but he managed to pull them off one leg."

DEFENSE. During all this period, you were pleading with the defendant to allow you to go?

A. Yes.

Q. What did you tell him?

A. I said my father would be coming to get me and I had to get up early in the morning, and it would spoil my clothes.

Q. Did you tell him you would meet him another night?

A. Yes—to get away from him.

Q. Did you tell him you were undergoing a menstrual period and couldn't undergo any relations with him?

A. I don't understand you.

Q. Did you tell him you had a period then and couldn't have relations with him?

A. No.

Q. Did you tell him you would meet him another night for that reason?

161 Prosecution. Unless the Defense states he has evidence he will produce to the court to contradict the witness, I object to this line of questioning.

Defense. This all goes to the question of whether or not the witness may or may not have given her consent to the relation.

Law Member. Objection overruled.

Defense. Did you tell him you were undergoing a menstrual period?

Witness. No.

Q. Did you tell him you couldn't have relations with him because of that?

A. No.

Q. Did you tell him you would meet him another night?

A. I don't remember.

Q. When he began to put his head into your lap, was your back on the ground at that time or were you seated upright?

A. I don't remember.

Q. You don't remember whether or not you were seated in this fashion or whether you were lying down?

A. No.

Q. Could it have been he put his head in your lap while you were seated upright?

Prosecution. I object again.

Defense. His purpose is to break up the whole line—

Prosecution. The witness has stated she doesn't remember if she was seated upright or lying down.

Defense. The next question was: "Were you seated—"

Prosecution. She has already—

Law Member. Objection overruled.

Defense. Could it have been he began to mouth you while you were seated upright?

A. No.

Q. You are sure you were on your back at that time?

A. Yes.

Q. How long did he remain with his head in your lap?

A. I don't remember—maybe 3 or 4 minutes.

162 Q. While he was lying there at right angles to you, did you attempt to bring your body up to look about to see anything—or if anybody was passing?

A. Yes.

Q. His feet were extended away from you, his face was in your lap, and which hand did he use to push you down with when you attempted to get up?

A. His left hand.

Q. Did he strike you at that time?

A. No.

Q. Did you manage to get up at all during this time?

A. No.

Q. He was able to get you down firmly with his left hand and keep his face in your lap?

A. Yes.

Q. His body wasn't on top of you at all?

A. No.

Q. Did you try to struggle under his hand while his hand was holding you?

A. Yes. I tried to fight him.

Q. While you were moving your head about, your glasses didn't come off at all?

A. No.

Q. Will you remove those glasses just a moment please? The witness removed her glasses.

Q. When you wear these glasses do they press into the side of your temples or are they loose fitting.

A. They fit tightly at the nose.

Q. Put them on. May I remove them, please?

The Defendant Counsel removed the glasses from the witness' nose.

DEFENSE. When he finished mouthing you and you were lying in this prone condition, you testified you were quite exhausted, weren't you?

A. Yes.

Q. Did you continue to move about when he finished mouthing you? Did you put your legs together?

A. Yes. He was so much stronger than me he mastered me every time.

163. Q. Did he continue using his left hand and pushing you down with it?

A. Not when he got on top of me.

Q. Before he got on top of you?

A. His body was lying on the ground and he had his head in my lap.

Q. And how did he manage to get from on the ground to your body when you were trying to get up?

A. He did do it.

Q. Did he keep his left hand on your face?

A. He brought his hands up and pushed me down.

Q. He was lying at right angles to you and brought both hands up and held your shoulders with both hands?

A. Yes.

Q. Did you try to kick him in the crotch at that time?

A. I didn't dare.

Q. Why?

A. I didn't have the right shoes on. If I had kicked him there, it would have killed him.

Q. With both hands on your two shoulders he moved his person from the ground?

A. All I know I couldn't move.

Q. Did you attempt to cross your legs?

A. I did everything I could.

Q. Did you cross your legs when he attempted to get on top of you?

A. I don't remember.

Q. When he did get on top, did he insert himself into you or did you help him?

A. I didn't help him at all.

Q. Did he fumble about and have difficulty or was he able to penetrate immediately?

A. He had difficulty. I struggled all I could.

Q. Did you try to move your hips out from under him?

A. I couldn't he was hurting me so.

164 Q. Did you try to cross your legs?

A. I couldn't.

Q. You hadn't seen his person until then?

A. I didn't see it then.

Q. It very well could have been his fingers, as well as his person?

A. His finger could not have hurt me that way.

Q. You don't know whether it could or couldn't. You told the court you never saw his person. Did he take his hands down to open his trousers?

A. I don't know.

Q. Did he put any contraceptive on?

A. No.

Q. Did he have his hand about your private parts at any time?

A. No.

Q. His hand was not there at all?

A. No.

Q. He didn't use it to insert himself into you?

A. I don't know. I can't remember.

Q. You said his hands were not around your private parts, didn't you?

A. I suppose so.

Q. His hands were not about your private parts?

PROSECUTION. I think the Defense Counsel should be instructed that the examination should be conducted fairly and without raising the voice so as to excite the young lady here. I think he can get what he wants from the witness in a fair and impartial manner.

LAW MEMBER. Let the Defense Counsel stay about 6 feet away from the witness, so she will not think you are threatening her.

(To the witness). Just realize you are here for the purpose of giving information and don't get excited or frightened.

DEFENSE. I must object now to the references made to the Defense Counsel. Defense Counsel must conduct the examination as he sees fit.

LAW MEMBER. Under the supervision of the court.

DEFENSE. Exactly—but I am doing this in the defense of this boy.

LAW MEMBER. I would suggest you keep about 6 feet distance between you and the witness so the witness may fairly answer the questions you put to her.

165 DEFENSE. When you were first thrown into the long grass by this defendant—I withdraw that. Did you ever see this defendant at the Red Lion Public House in East Bergholt?

A. I have never been inside it.

Q. When you left the scene of this alleged crime you said you allowed the defendant to kiss you. Is that true?

A. At first I didn't. I struggled and then I saw he was getting mad again. I thought he was going to do it again, so I let him.

Q. Did he kiss you any time during the period he was either mouthing you or having relations with you? The only time he kissed you was when he left you?

A. Yes.

Q. Isn't it a fact when I spoke to you at Brantham Works you told me you had never kissed this defendant?

A. I didn't say no such thing.

Q. You don't remember saying you never kissed the defendant?

A. You stated you had been told I kissed him. I said I never kissed him; he kissed me.

Q. Where did he kiss you?

A. On the mouth.

Q. When you left the scene what time was it when you finally left there, do you think?

A. About a quarter to 12.

Q. Did you go directly home?

A. Yes.

Q. Did you ride the bicycle home or walk?

A. I rode.

Q. How long did it take from the place where the crime allegedly took place and the time you reached home?

A. 5 minutes.

Q. You reached home at what time?

A. I never looked at the time.

Q. Didn't you tell me you reached him at 12 o'clock?

A. I am only just judging. It was about 12.

Q. How long was it you talked to your mother and sister, before your sister went for Pvt. Vandergrift, whom you referred to as "Bill"?

166 A. I couldn't tell; I was too hysterical.

Q. Were you in the house a half hour?

A. I don't know.

Q. Were you in the house a minute?

A. I don't know.

PROSECUTION. Objection.

LAW MEMBER. Overruled.

DEFENSE. Were you in the house an hour before Pvt. Vandergrift was sent for?

A. I don't remember.

Q. When Pvt. Vandergrift came in what did you tell him?

A. I was screaming; I was too hysterical. I don't remember.

Q. Isn't it a fact you told him two soldiers came along the road and the defendant was scared off and he left you?

A. No.

Q. You didn't say that to him?

A. I don't remember.

Q. Did you say anything to Vandergrift, or your mother or sister about two soldiers coming along the road and scaring this defendant off?

A. No.

Q. Do you remember seeing two Americans coming down the road?

A. Yes.

Q. Did the defendant leave before or after they passed you?

A. The only time I saw two soldiers was when I first met him and he shouted something to them and they went on.

Q. While you were in the long grass, you didn't see the soldiers at all?

A. No. Just before I got home there were two lights coming along the street.

Q. You don't know if they were driven by Americans or British?

A. No.

Q. There wasn't any two soldiers who scared this soldier off?

A. No.

167 Q. You are sure of that?

A. Yes.

Examination by the Court.

President of the Court. There have been a number of questions about the time. Were you wearing your watch that evening?

A. No.

Q. How do you place the time of certain events?

A. Just by my own judgment.

Q. At some time in the evening did you look at a watch or clock or did someone mention the time?

A. When we left home I saw the clock.

Q. What time was it then?

A. Half past 10.

Q. At any time after that did you know exactly what time it was by someone saying: "It's 11:30—I'm going home"—or any such statement?

A. No.

Q. Did you see a clock or watch when you returned after the incident?

A. No.

Q. When you were lying in the grass and screaming—the first time you screamed you said the accused made a certain statement—said something to you. What again were his words?

A. He said if I didn't stop screaming he would murder me.

Q. Did he use that word or some other word?

A. Just that word.

Q. Did he say anything else of a threatening nature at that time or after your next scream?

A. No.

Q. Can you recall the position he was in? You answered before his body was at right angles to yours. Was it in that general position or can you remember if it was any other?

A. It was right angles as nearly as I can remember it.

Q. When he got on top of you how did he move your legs apart?

A. I don't remember.

Law Member. Some reference has been made in the testimony to a menstrual period. Were you in the midst of a menstrual period at the time this occurred?

168 A. No, I had just finished.

Q. How many days before had you finished?

A. I had been finished about three days.

President of Court. When you made excuses, as you answered before, when he was attempting to get on top of you, what was the purpose of those excuses? Why did you make those excuses?

A. I thought perhaps he would let me go.

Law Member. (To President of Court) When you say "excuses" are you referring to any statement that she was in the midst of a menstrual period?

President of Court. No. She said her father was coming, her clothes would be spoiled, etc.

President of Court. (To witness) Your object in making remarks

HJMcN DPG

those was why?

A. I thought perhaps he would let me go.

Q. When you arrived home and talked to your mother and sister, before you took the hot bath, did your mother or sister or you look at your body when you took off your clothes?

A. Mom did when I took off my clothes.

Q. Were there any marks on your body that had not been there prior to that evening?

A. I got scratches on my knee.

Q. What sort of scratches?

A. In the long grass there were brambles and I remember scratching myself.

Q. How did you get the scratches on your knee?

Q. From the brambles—when he was dragging me on to the grass.

Q. Were you on your knees?

A. Yes, when he was getting me to the ground.

Q. Were there any other marks?

A. Not then; they didn't come out until the next morning. I had several bruises.

Q. They were on parts of your body you could see?

A. Yes.

Q. Describe the location of the bruises.

A. There were three on my right leg, another one on my left knee—above my knee—another bruise on my left arm here (indicating above the elbow).

Q. You know those bruises were not there prior to that evening?

169 A. No.

PROSECUTION. I don't think she understood your question, Colonel.

President of COURT. You know the bruises were not there before that evening?

A. Yes; I know they were not there that evening.

DEFENSE. At the time you were with Kentucky, you fixed the time about 11 o'clock, did you hear the bells ringing—the 11 o'clock bells?

A. No.

Q. I don't quite understand how you got the bruises on your knees. Were they in front of your knee caps?

A. I said they were above my knees. (The witness indicated her knee caps)

Q. They were grazes?

A. They were bruises.

Q. You say you got scratched on the knee cap coming thru the brambles. Do you mean the brambles were that high they touched your knees?

A. Yes, the grass was very high and I think they are blackberry brambles and come that high.

Q. Blackberry brambles as high as your knee caps?

A. Yes.

President of COURT. When I asked about scratches before, you said in one place he was dragging you thru the bushes and one or both knees were on the ground. I think you said Yes. Was he dragging you on your knees?

A. No, my knees were not on the ground.

Q. You said he dragged you back. What do you mean by "dragged you back" after you ran away from him?

A. He got me from the back and put his arms on top of my arms and pulled me back.

Q. You were on your feet at that time?

A. Yes.

DAVIDSON, JAMES, DR., a British civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?

A. Dr. James Davidson.

170. Q. What is your business or profession?

A. Medical practitioner and director of the Metropolitan Police Laboratory.

Q. Where did you take your university training?

A. Edinburgh University.

Q. What did the course consist of?

A. The usual course—practitioner of medicine.

HJMcN DPG Q. Enumerate some of the courses, please.

A. Pathology and forensic medicine.

Q. For how long a period did you study at the University of Edinburgh?

A. Five years.

Q. Did you obtain a degree there?

A. I did.

Q. What date?

A. 1920.

Q. After you obtained your degree, did you engage in any private practice of medicine for any particular length of time?

A. No.

Q. Where did you then go after receiving the degree?

A. I was a house physician for six months and then I started laboratory work which I have carried on ever since.

Q. Has that been at the Metropolitan Police Laboratory?

A. No. In Edinburgh until the year 1935.

Q. After 1935 did you then go to the Metropolitan Police Laboratory?

A. I inaugurated the Metropolitan Police Laboratory. I opened it.

year.

HJMcN DPG Q. On what ~~day~~?

A. In 1935.

Q. Have you been engaged in the work and head of the Metropolitan Police Laboratory since that time?

A. I have.

Q. In this work and as head of the Metropolitan Police Laboratory what did you do?

171 A. I do laboratory work, examination, laboratory examination of various types, materials which have been submitted from various types of crimes.

Q. Doctor, on or about 20 July 1944, did you receive a pair of knickers and a skirt from the constabulary Clacton-on-the-Sea?

A. I did.

PROSECUTION. May the witness refer to his memoranda?

DEFENSE. No objection.

LAW MEMBER. You are satisfied the doctor is testifying about one of these articles of clothes introduced in evidence?

DEFENSE. No, he will have to identify that.

PROSECUTION. All I said was did he receive a pair of knickers and a skirt and he said Yes.

PROSECUTION (to witness). I hand you what has been marked Prosecution's Exhibit 1 and ask you can you identify that exhibit?

A. Yes.

Q. What is it?

A. A skirt.

Q. How do you identify it?

A. By the color and type and by certain marks which I have placed here.

Q. That mark is what?

A. That mark is an area of seminal staining.

Q. I hand you what has been marked Prosecution's Exhibit 2 and ask you if you can identify that?

A. Yes. It is the pair of knickers.

Q. How can you identify it?

A. By the color and by certain marks I have made on it, and I have also cut a piece of the material out for examination.

HEMEN 1093 Q. Doctor, referring to Prosecution's Exhibit 1 and 2, did you make any test concerning the exhibits?

A. I did.

Q. What, if any, test did you make?

A. I examined certain stains which were present. On the skirt there was a stain on the near surface of the back, which, on examination, proved to be that of a seminal stain.

The knickers show extensive staining in the
172 region of the fork and an examination proves that to be seminal fluid.

Q. What examination did you perform in order to have indicated to you the stains were due to semen?

A. A microscopic examination.

Q. How could you tell from a microscopic examination the stains which appeared on Prosecution's Exhibits 1 and 2 were semen?

A. By the presence of what are known as spermatozoa or male seed, which are quite obvious and can only be present in seminal fluid.

Q. What is seminal fluid?

A. Seminal fluid is the secretion which is produced by the male in the impregnation of the female.

Q. What brings forth the semen of the male during what act?

A. The act of sexual intercourse.

Q. When did you make this examination, doctor?

A. I would have to refer to certain notes to refresh my recollection—I made the examination on the 22nd of July.

Q. Where?

A. In the laboratory.

Q. Did you bring Prosecution's Exhibits 1 and 2 with you today?

A. I did.

Q. They have been under your control and possession since the 20th of July?

A. Yes, they have.

Cross Examination.

Questions by Defense.

Q. Doctor, with reference to this semen, how long does this spermatozoa remain alive in the semen?

A. It does not remain alive any length of time. Whenever a stain dries the spermatozoa die, but remain there as dead specimens.

Q. Would that be visible any length of time?

A. Yes.

Q. For as long as 11 days?

A. Yes, most certainly.

Q. When you made the microscopic examination of these stains in those two garments—if the stain had once been in the vagina would there be any difference?

173 A. Yes. I would still recognize it as seminal fluid.

Q. If you viewed microscopically a seminal stain that had been in a woman's vagina and semen that had not been in the vagina, would you be able to see any difference under the microscope?

A. No—no great difference that you can be certain of. I find in my experience frequently when spermatozoa have been in the vagina and escape again, they have lost their tails.

Q. Do you find that to be almost the rule?

A. It is a very common observation.

Q. Upon examination of these two garments under the microscope, are you in a position to say whether or not the semen had been in the vagina?

A. No, I am not. I could say the spermatozoa were lacking in tails, but there is no definite proof it has been in the vagina. The only difference is in the stain in the pants.

Q. It could have been an ejeculation on the clothes and not coming out of the vagina at all?

A. That is a possibility.

Redirect Examination.

Questions by Prosecution:

Q. Doctor, when you made your examination, did there in fact appear some of the spermatozoa without tails?

A. Yes.

Q. And on the shirt?

A. Yes.

Q. On the pants also?

A. Yes.

Examination by the Court.

President of Court: Your test for semen is a positive test?

A. It is a positive test. You must see the spermatozoa before you can diagnose seminal fluid.

Recross Examination.

Questions by Defense:

Q. The Trial Judge Advocate asked you whether or not any of the spermatozoa had tails?

A. Yes.

Q. It is a fact there were some on this garment that did have tails?

A. Yes. Some of the spermatozoa had tails and some had not, but one cannot give a definite opinion whether or not it has been in the vagina or not.

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The witness was then excused and withdrew from the room.

Beckett, Frederick H. E., Dr., a British civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

Q. What is your name?

A. Dr. Frederick Harry Eli Beckett.

Q. What is your business or profession?

A. Medical practitioner.

Q. Where do you practice?

A. Manning Tree, Essex.

Q. Did you have any university training?

A. Yes. London.
Q. For how long a period of time?
A. About 7 years.
Q. Where was it?
A. University of London.
Q. Were the courses you took medical courses?
A. Yes.
Q. When did you receive your degree?
A. In April 1932.
Q. Since that time have you engaged in the practice of medicine?
A. Yes—the whole time.
Q. Have you specialized in any one particular type of practice?
A. I am only a general practitioner.
Q. Did you have any interneship or act as house physician at any hospital?
A. Yes.
Q. Where was that?
A. Do you want them all?
Q. A few.
A. The Radcliffe at Oxford, the Lincoln County at Lincoln, Royal at Portsmouth, the Selly Oak—
Q. Calling your attention to the 12th of July, 1944, about 10 o'clock in the morning, did you have occasion to examine the girl known to you as Winifred Dale?
A. Yes, I did.
Q. Where did that take place?
A. At my house in Manning Tree.
Q. What examination did you make of the girl?
A. She had a complaint of something and I therefore rang the police and waited until the police came down and then examined her from top to toe, really.
Q. What did your examination disclose?
A. She had some bruises of the right thigh, her left arm, left knee and a graze on the left knee.
Q. What was the appearance of those bruises?
A. They were fresh bruises.
Q. What do you mean by that?
A. They had occurred recently. It was not a week ago—they weren't yellow.
Q. Did you make any further examination of the girl?
A. I did a vaginal examination.
Q. What did that disclose?
A. She was not virgo intacta.

Q. What does that mean in lay language?

A. She was not a virgin.

Q. In other words, the hymen had been broken?

A. Yes.

Q. As a result of her complaint did you have any test made?

A. Yes. I referred her to the East Sufolk and Ipswitch Hospital, where they did a Zondek-Aschheim.

DEFENSE. I object.

LAW MEMBER. I think it depends on the doctor's acts in participating in the test. Overruled.

176 WITNESS. I rang the pathological laboratory at Ipswitch and they told me it was positive.

DEFENSE. I object and ask that that be stricken.

LAW MEMBER. Objection sustained and it will be stricken.

PROSECUTION. May the doctor explain so the court will know.

WITNESS. I did do another test myself. If one injects a substance called prostigmine, menstruation in a normal woman is supposed to follow within three to four hours. I gave her three injections in three successive days. They were negative. That is a test for pregnancy.

LAW MEMBER. Is that a positive test?

WITNESS. I don't think it is as positive as the Zondek-Aschheim.

PROSECUTION. When you state the prostigmine test was positive, what do you mean?

A. She did not menstruate after it.

Q. Your examination disclosed after three injections of the drug that she did not menstruate?

A. Yes.

Q. What did that mean to you?

A. It suggested she was pregnant.

Cross Examination.

Questions by DEFENSE.

Q. Were you able to say, Dr. Beckett, by virtue of this test and by virtue of the examination at what stage the pregnancy was?

A. No. The physical examination revealed no signs of pregnancy and the prostigmine test—no I am not a sufficient pathologist to tell you how long a woman has to be pregnant for this test to be positive.

LAW MEMBER. Is that the rabbit test?

A. Yes. I am not sure how far a woman has to be pregnant.

DEFENSE. It is a fact that this prostigmine test is not a positive test and while the patient would not have her period she still would not be pregnant?

A. I think if I were to answer truthfully, without knowing the actual percentage, it is an accepted test for pregnancy but I wouldn't say it was as reliable as the Zondek-Aschheim.

Q. It is not used to the same extent as the Zondek-Aschheim?

A. No, because it is a comparatively recent thing. I think it is only in the last two or three years.

177 Q. Does this test suggest any fashion whatsoever under which you could examine her subsequently and determine the stage of pregnancy. After giving this test, does anything appear whereby you could state the stage of the pregnancy?

A. Well, if a woman pregnant were to abort one could tell how far she was pregnant by the products, but you see if this test is positive, nothing happens. If you inject prostigmine and a woman is pregnant, she doesn't menstruate.

Q. Does it cause her to abort?

A. They say no. They say it can be safely given as a test to a woman without causing abortion.

Q. When this girl came to see you, did she come to you with the view of getting this prostigmine test?

A. No, she came complaining she had been raped by a man and no contraceptives were used and she was worried about it in case she be pregnant.

Q. Didn't you inform her that during the first three weeks of pregnancy nothing could be done and you could not make an accurate test as to whether she was pregnant?

A. With regard to an ordinary pelvic examination of a woman, unless you are an expert gynecologist, you cannot make an accurate test.

Q. Would the Zondek-Aschheim or this prostigmine test indicate that there was a pregnancy where that conception had taken place within 24 hours preceding?

A. No, I don't think so. I mean the test was not given then. It was sometime afterwards these tests were done.

LAW MEMBER. Only tell what you actually know. If you only know by what someone told you, that is not competent.

WITNESS. I have a record that 1 cc of prostigmine was given on the 2nd of this month.

DEFENSE. When did you send her for the Zondek-Aschheim?

A. On the 15th I sent her to see Mr. Stansfield at Ipswitch.

DEFENSE. I ask that all the testimony with reference to the Zondek-Aschheim test be stricken from the record on the ground that it took place three to four weeks after the commission of the offense on July 11th. You certainly cannot link up the 11th with tests which occurred in a case of this kind.

LAW MEMBER. Objection overruled except to the extent that the results of the test have heretofore been eliminated by the court.

DEFENSE. That would refer only to the Zondek-Aschheim test?

LAW MEMBER. Yes.

DEFENSE. As to the prostigmine test?

LAW MEMBER. That will be considered by the court.

DEFENSE. Despite the intervening period of almost four weeks?

178 LAW MEMBER. Despite that.

DEFENSE. Dr. Beckett, these bruises you found upon the person of Miss Dale—could they not have been bruises incurred in a bicycle fall?

A. Possibly. I have no evidence. I can't say how they occurred.

Q. When you spoke to her, she complained the bruises had been incurred during the 24 hour preceding period, didn't she?

A. Yes.

Q. If they were manual bruises inflicted by a rough hand, would you be able to observe them at 12 or 14 hours later?

A. I suppose you might.

Q. Would you be able to say at such an examination which occurred 12 to 14 hours later these were bruises incurred by a rough hand?

A. One might under certain circumstances, if imprints of the fingers were there, but that wasn't so in this case.

Q. There weren't any imprints about her neck?

A. No.

Q. Any imprints around the pelvic area?

LAW MEMBER. Were there any bruises around the pelvic area?

A. No—I didn't notice any except on the right thigh, the left knee and left arm.

DEFENSE. How far above the knee was the bruise on the left knee?

A. About half way up, I should say.

Q. You said it could have been incurred by a bicycle fall?

A. I would say it was possible.

Q. At an examination held 12 to 14 hours after intercourse allegedly takes place, are you in a position to say whether or not intercourse has taken place?

A. In the case of a virgin, I think one could say there would be evidence of the breaking of the hymen, but in the case of a girl not a virgin, I don't see how one could, except by—

Q. Would you be able to tell by the presence of spermatozoa in her vagina?

A. I wouldn't think so, after that 12 hour period.

Q. Did you make an examination of her vagina?

A. Yes.

179 Q. Did you note she was bruised inside of her?

A. No.

Q. But she wasn't virgo intacta?

A. No.

Q. Did you make a manual observation?

A. Yes.

Q. Did you observe at that time—and would you say she was sore about her person?

A. No, I don't think so.

Q. If the patient had been treated roughly and if at the time of intercourse she complained of great pain, would an examination 12 hours later indicate signs about her person that she had been treated roughly?

Prosecution. Objection to that question.

Law Member. Objection overruled.

Witness. Well, it might. It would depend on how one conducted such an examination. I did a pelvic examination in which one uses two fingers and looked for abrasions to see if the hymen had been recently torn. That I did not find. My examination would, in all probability, be much more gentle than the action you suggest.

Law Member. If this girl had been roughly treated and to such an extent she experienced pain on penetration, would there be some physical manifestation on her person at the time you examined her of such force?

A. It is difficult to answer, sir. One's fingers—there is a question of size—and I think an object as large as—

In view of the obvious embarrassment of the witness the Prosecution stated:

Prosecution. If it is a question of embarrassment, you can speak frankly.

Witness. I think a person who had been raped might show signs even if a virgin would definitely show signs, and a woman who is not a virgin might. It would depend upon the amount of intercourse she had had and the anatomical stature of the man who had had intercourse with her. My fingers are not long and not very large and probably would not give rise to discomfort. We are used to examining people to avoid giving them pain. The answer is it might.

Prosecution. I ask that his answer go out. What might have been are the saddest words of tongue and pen.

Law Member. Objection overruled.

Defense. We are trying to determine whether or not upon an examination 12 hours after an alleged rape, if she were roughly treated, would you be able to determine it then?

180 A. You might. It would depend on the anatomical size of the man.

Law Member. Your answer is—you might or you might not?

A. Yes, sir.

Examination by the Court.

Member of Court. Would you say the hymen had not recently been torn?

A. Yes, sir. There was no evidence of recent—no injury in the vagina at all that I noted.

President of Court. When did your examination take place?

A. After surgery hours—that would be about 10 o'clock on the 12th of July.

Q. Was there any indication to your eye in the examination of the girl of any abrasion or tearing of tissue or anything that would indicate force?

A. She had the bruises I have mentioned. I did not note any other injuries except those I have mentioned.

Q. Did she, in fact, have an abortion at any time after the 12th? That you know of?

A. No.

The witness was then excused and withdrawn from the room.

The court then at 1:00 P. M. recessed until 2:00 P. M., at which time the personnel of the court, the Prosecution and Defense, the accused and the reporter resumed their seats.

DALE, PAMELA JOY, a civilian, residing at Victoria Cottages, Station Road, Lawford, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, please.
A. Pamela Joy Dale.
Q. Where do you live?
A. Victoria Cottages, Manning Tree.
Q. How old are you?
A. 18 years.
Q. Do you work anywhere?
A. At the BX Plastics, Brantham.

181 Q. Calling your attention to the 11 of July 1944, at about midnight on that date, where were you? Or shortly before midnight?
A. I came downstairs when my sister came in.
Q. Were you at home?
A. I was indoors.
Q. Where had you come from?
A. From Bergholt.
Q. About what time was it you arrived home?
A. Just before half past 11.
Q. Was your sister, Winifred Dale, with you?
A. No.
Q. Did your sister, Winifred Dale, come home?
A. Yes.
Q. About what time was it she came home?
A. 10 minutes to 12 or 5 minutes to 12.
Q. How do you fix the time as being about 5 or 10 minutes to 12?
A. I couldn't tell exactly. I didn't look at the clock.
Q. What first attracted your attention to the fact that Winifred came home?
A. I was lying in bed and I heard her on the bicycle coming down the yard.
Q. What next occurred?
A. I heard her throw her bike outside the house. She opened the door and we heard a hysterical cry.
Q. Did she say anything at that time?
A. She came to the bottom of the stairs and said: "Mamma, come—be quick" and "Pam, why didn't you wait for me?" I immediately jumped out of bed and went downstair to her.
Q. Did you see Winifred Dale there?
A. Yes.

Q. What did you notice about your sister?

A. She was sitting in the kitchen with her head in her hands and her coat just on her shoulders and her blouse was undone at the neck and the snaps of her skirt were undone.

182 Q. Did she say anything at that time?

A. She said: "I am sure I have been attacked—"

DEFENSE. Object on the grounds there has been an intervening time from the alleged offense and the time of the conversation held by the witness on the chair now. There was an opportunity for her to have independent thought and therefore this conversation does not form part of the *res gestae*.

LAW MEMBER. How long after your sister came into the house did she make the statement?—You heard her first throw her bicycle down and then her voice downstairs and then you got out of bed and came downstairs and went into the kitchen where you found her. In the kitchen, when the statement was made—how long was that after she arrived home?"

WITNESS. About 5 minutes.

LAW MEMBER. The objection by Defense is sustained.

PROSECUTION. I would like to proffer for the record, if the court please, ~~that~~ If the witness were allowed to testify in answer to the question: "What if anything did your sister say?" the witness would say that she (her sister) had been assaulted by an American soldier. [(Referring to the last answer to the question by the witness as stated in open court *relative to witness saying her sister said "I am sure I have been attacked—"*

LAW MEMBER. The remark or answer of the witness will be stricken unless the T. J. A. wants it for record purposes.)]

This done out in hearing of court by whispering the proffer to Legionnaire to the Court Reporter.

DEFENSE. No, I ask it be stricken and that the court disregard it.

LAW MEMBER. Quite right.

PROSECUTION. For the record and as argument for the overruling of the objection made by Defense, I want to quote to the court G. C. M. case 228891, dated Jan. 21, 1943, found in the Bulletin of The Judge Advocate General of the Army dated January 1943, on the question of admissibility of evidence:

"(22) Hearsay; *res gestae*.—Accused was found guilty of rape, in violation of A. W. 92. The testimony of the victim, which was corroborated by a written confession of

the accused and by medical testimony, indicated that, immediately after the incident, the victim ran out of the house and down the street, where she met her sister. The sister was permitted to testify that the victim, upon meeting her, stated that accused had tried to choke her and had 'done that'. Held: The admission of the sister's testimony was proper. Evidence as to a complaint made shortly after the commission of the offense of rape is admissible for the purpose of corroborating the testimony of the prosecutrix relative to the *corpus delicti*. C. M. 228891, Jan. 21, 1943."

I say a matter of five minutes, testified to by the witness here, comes within the ruling made by The Judge Advocate General of the Army in that it was made shortly after the commission of the offense, in fact, as soon as the girl got to her home and the young lady who is testifying came down to the room where she found her sister.

LAW MEMBER. Objection is still sustained.

183 PROSECUTION. Also refer the court to pages 367 and 368, Section 199 and 200, Underhill on "Criminal Evidence."

LAW MEMBER. Objection still sustained.

PROSECUTION. Now, Pamela, did you see the skirt worn by your sister that evening?

A. Yes, I did.

PROSECUTION. I hand you what has been marked Prosecution's Exhibit 1 and ask if you can identify that exhibit?

A. Yes, that was the skirt my sister wore that night.

Q. Did you examine the skirt you have identified as Prosecution's Exhibit 1?

A. No, I did not.

HJMcN DPG Q. Look at it. Just glance at it. *Did* you see anything that night

HJMcN DPG about it, that was unusual?

A. There was a wet mark on it.

DEFENSE: Objected to and ask that it be stricken, in the absence of proof that the witness examined the skirt previously, the fact there was a stain there then—

LAW MEMBER. Objection overruled.

PROSECUTION. Where was that wet stain?

A. On the back of the skirt.

Q. Can you indicate to the court where you saw the wet stain?

The Witness indicated the back of the skirt.

Q. Did you see the knickers worn by your sister that evening?

A. No.

Q. After you had talked with your sister, did you leave the house?

A. Yes.

Q. Where did you go?

A. I knew there was an American soldier in the third house up the yard and we knew him. I knew he would be there and I wanted to go to the police that night.

DEFENSE. I object. It doesn't involve the defendant or the prosecutrix in this case.

PROSECUTION. I will connect it up.

184 LAW MEMBER. She can tell what she did.

DEFENSE. But about calling the police—

LAW MEMBER. About calling the police, that will be stricken and won't be regarded by the court.

PROSECUTION. Did you get the soldier?

A. Yes.

Q. Do you know his name?

A. All I know is Bill.

Q. Do you know where the soldier went?

A. He came out with me.

Q. Did he go to your house?

A. Yes. He came straight to the house.

Neither the Defense nor the Court cross-examined the witness, who was then excused and withdrawn from the room.

in view of the ruling of the Law Member on statements as part of the *res gestae*

PROSECUTION. Also, I would like to proffer for the record the following: If Mrs. Ellen May Dale, the mother of the girl, Sheila Winifred Dale, were called to testify, she would testify that: "Just after twelve o'clock I heard someone come in the front door and I could hear the person crying. Sheila then called out to me: 'I have been attacked by a maniac and if I hadn't given way to him he would have murdered me.'"

This was done not within hearing of the court whereupon the proffered testimony to the court reporter. HJMcN by DPG

VANDERGRIFT, WILLIAM, Pvt., 1260th MP Co., Det. "A", Station E-157, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. William Vandergrift, Pvt., 1260th MP Co., Det A. this station.

Q. Do you know the accused in this case; if so, state his name.

A. All I know his name is Smith.

Q. Do you see him in the court room?

A. Yes, sir.

Q. Where is he seated?

The Witness indicated the accused.

185 Q. Calling your attention to the time of about 2345 hours on 11 July 1944, did you see Pamela Dale?

DEFENSE. Objected to as incompetent.

LAW MEMBER. Overruled.

PROSECUTION. I will connect it up.

WITNESS. I seen her about a quarter to 12, sir.

Q. As a result of seeing Pamela Dale, where did you go?

A. I was visiting three houses up from her home.

Q. When Pamela came where did you go?

A. To her home.

Q. You mean Pamela Dale's home?

A. Yes.

Q. Whom did you see there?

A. There was Winifred, Pamela and her mother.

Q. What condition did you see Winifred Dale in at that time? Describe her clothing.

A. Well, I thought for sure I seen dirt on the breast of her blouse. The condition she was in—she was crying, white, shaking, and the front of her blouse was open.

Q. Did Winifred Dale say anything to you at that time?

DEFENSE. Objected to on the ground that this does not form part of the *res gestae*.

LAW MEMBER. He can't state what she said.

Q. Did she say anything to you at that time?

A. Yes, sir.

Q. What did she say?

DEFENSE. Objected to as it does not form part of the *res gestae*.

LAW MEMBER. Objection sustained.

Prosecution. I again cite for the court the authorities which appear after the other objection was sustained as to whether or not the statements made to the witness by Winifred Dale are admissible.

Cross Examination.

186 Questions by Defense.

Q. Pvt. Vandergrift, when you saw Miss Dale, Miss Winnie Dale, where was this dirt?

A. I thought I seen it on the breast of her blouse.

Q. Was she buttoned up?

A. She was unbuttoned.

Defense. I show you this skirt and ask you if you recognize this skirt?

A. No, sir.

Q. How far were her buttons unbuttoned?

A. Just about two buttons.

Q. Sufficient to expose her breasts?

A. I saw them, sir.

Q. Were any red markings about them?

A. I couldn't tell you.

Q. Anything you noted?

A. I can't tell you.

Q. You spoke about dirt—what did you mean? Soup stains?

A. It was just a light mark of dirt.

Q. Do you mean soil that is outside?

A. I would call it just dust.

Q. It wasn't real pure black dirt?

A. No, but it was a marking on her dress.

Q. Was her hair unkempt?

A. Yes, sir.

Q. Did she have any lipstick on?

A. I wouldn't say so.

Q. Did she have her glasses on?

A. No, sir.

Q. Were her glasses broken?

A. I don't remember whether she told me they were broken or not. I think she told me she dropped them.

187 Examination by the Court.

President of Court. Did you notice her shoes?

A. No, sir.

Q. Did you notice the skirt she was wearing? The condition of it?

A. I didn't take notice.

The witness was then excused and withdrew from the room.

CULLUM, MIRIAM FLORENCE, 57 Colchester Road, Lawford, Essex, England, a civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?
A. Miriam Florence Cullum.
Q. Where do you live?
A. 57 Colchester Road, Lawford, Essex, England.
Q. How old are you?
A. 19.
Q. Are you working now?
A. Yes.
Q. Where?
A. Wrabness Mining Depot.
Q. At about 20 minutes to 11 on the night of 11 July 1944, where were you at that time?
A. Just leaving Brantham.
Q. Where were you going?
A. Home.
Q. Was anyone with you at that time?
A. Yes.
Q. Who?
A. Mrs. Kerry.
188 Q. Were you walking or were you out, going home?
A. I was wheeling my cycle and walking.
Q. Did anything unusual happen as you were walking along with Mrs. Kerry? Did you see anyone pass you by?
A. Yes, an American soldier.
Q. What did that American say to you, if anything?
A. Nothing in the first place.
Q. Did you continue to walk on?
A. Yes.
Q. Did you see that American again?
A. Yes, he came back and stopped and asked us where we were going.
Q. What did you do then?
A. Mrs. Kerry replied "Yes."
Q. What then happened?
A. He asked us if he could see us home. Mrs. Kerry said: "No, thanks."
Q. At that time about what point had you reached in walking along?
A. We just had gotten around the corner.

Q. Did anything happen there?
A. No.
Q. Did you eventually come to the Crown Public House?
A. Yes.
Q. Did you see the American there?
A. He was still walking alongside us.
Q. What did he say at that time?
A. He asked us where we lived.
Q. What, if anything did you say?
A. Mrs. Kerry replied she lived at Braintham.
Q. Did you continue to walk on?
A. Yes.
Q. Did you get to a point between the two bridges on the way to Manning Tree?
A. Not then. The American moved off and asked if he could see us home again, and Mrs. Kerry said: "No thanks." and then she said Good Night to me. I got on my bicycle and at the bridge he caught me up.
189 Q. That was the same bridge?
A. Yes.
Q. What time was that?
A. 20 minutes to 11.
Q. When he caught you up, did he say anything to you?
A. He asked to see me home.
Q. What did you say?
A. No, thanks.
Q. What did he say?
A. "Please."
Q. At that time where were you?
A. On the roadway.
Q. Toward Manning Tree?
A. Between the two bridges.
Q. What happened at that time?
A. When we got over to the white bridge, just by the house, he asked me again to see me home and then he just turned the wheel of his cycle into mine and knocked me off.
Q. You mentioned the house—do you know the name of that house?
A. No.
Q. What side of the road is it on, going toward Manning Tree?
A. The right hand side.
Q. Are there any other houses around there?
A. No.
Q. When you fell off your cycle, when he turned his wheel into you, what happened to you?

A. I struck my head on a telegraph pole.
Q. What happened to your cycle?
A. It laid fallen on the grass ledge.
Q. What did the American do to you then?
A. He grabbed hold of me.
190 Q. Where did he grab hold of you?
A. My arms, I think.
Q. What did he do to you?
A. He tried to drag me over to the right of the field.
Q. What did you do to him?
A. I pulled his hair, scratched him and kicked him.
Q. What did he do then? Did he let you go?
A. No.
Q. Did you fall down at any time?
A. Yes.

DEFENSE. I ask that the Prosecution stop leading this witness.

PROSECUTION. I think because of the reluctance of the witness, to bring out the questions I should be permitted, in view of the type of the offense, to ask certain leading questions.

LAW MEMBER. It is very apparent to the court that the witness is either embarrassed or reluctant and I will allow the same line of questioning you are pursuing at the present time. (To Defense) If you later wish to make an objection, you may do so later on and we will rule on it then.

PROSECUTION. When you fell down what did he do?
A. He kicked my shoulder.
Q. Which shoulder?
A. The left.
Q. What else did he do?
A. I managed to get away from him over to the little bank on the field and just about to the roadway.
Q. Then what happened, Miriam?
A. I screamed again and he grabbed hold of my throat.
Q. When he grabbed your throat, how did he grab it?
A. I don't know how to describe it. He grabbed me here (indicating both sides of her neck).
Q. Could you scream then?
A. No, I was too terrified and lost my voice.
191 Q. Did he say anything to you at that time?
A. The whole while he was mumbling something.
Q. What did he say?
WITNESS. Could I write it down? I can't say it.
Q. Did he say: "I am going to fuck you"?
A. Yes.

Q. About how many times did he say that?

A. Several times but then he kept mumbling something I couldn't understand.

Q. When he said that, what did you do?

A. I just went on struggling.

Q. Did you try to bite him at that time?

A. Yes, I bit his hand.

HEMLOK 0367 Q. Did he hit you *on* the head at that time?

A. Yes.

HEMLOK 0368 Q. What did he hit you *on* the head with, if you know?

A. His clenched fist.

Q. Where were you when you bit his hand—with relation to the paved part of the roadway?

A. In the roadway.

Q. Did he get you off your feet other than at the one time when you fell down and he kicked you?

A. No.

Q. What happened then after you bit his hand?

A. It was then he grabbed me around the throat.

Q. Then what happened?

A. Before that once I managed to get away from him and I was going to run toward the station. Then he caught me and grabbed my throat.

Q. When that happened what was the relation of his body to you? Which way was he facing?

A. Toward Brantham.

Q. Could you see his face at that time?

192 A. Yes.

Q. Could you describe him? How did he look to you?

A. He just kept making faces.

Q. Describe his face.

A. He just kept narrowing his eyes.

Q. What color hair did he have?

A. Fair.

Q. How about his teeth?

A. There were several missing.

Q. Do you remember which side they were missing on?

A. The right I think?

Q. You are not sure of that?

DEFENSE. I object. He is bound by the first answer.

LAW MEMBER. The court does not consider it so.

At this point the witness broke down and started to sob, and the court took a recess of 10 minutes, at the end of which time the personnel of the court, the prosecution and

defense, and the accused and the reporter resumed their seats. The witness also returned to her seat.

PROSECUTION. I asked you whether or not he had some teeth out. Do you remember whether or not they were out on the right or left side of his mouth? If you don't remember now, say so.

A. I don't really remember.

Q. Do you recall what kind of uniform he had on that evening? The evening about which you have told the court?

A. An American uniform, no stripes.

Q. Do you remember what kind of cycle he was riding?

A. A high one.

Q. Do you remember the color?

A. I should think it was khaki, but I can't be sure.

DEFENSE. I ask that be stricken—she doesn't remember.

LAW MEMBER. Do you remember the color?

A. Only very vaguely I do.

LAW MEMBER. Was it painted dark or light?

193 A. I don't recall.

Q. You don't actually remember what color it was?

A. No.

LAW MEMBER. Objection sustained.

PROSECUTION. I ask you now to look around the court room and point out the man, if you see him here in the court room, who did the things to you you have related to the court on the evening of 11 July 1944.

A. Yes.

Q. Where is he seated?

The witness indicated to the right of the Defense Counsel, identifying Pvt. Smith, the accused.

PROSECUTION. At the time he had hold of your throat, did he do anything after that?

A. No.

Q. What happened then?

A. I was near enough to the side of the road where the bikes had fallen.

Q. Did anyone come along there?

A. Yes.

Q. Who?

A. Mr. Welham and a soldier.

Q. Just before those two men came along, what was the accused doing to you then? At the time he had hold of your throat and before the two men came along—Mr. Welham and the soldier—did the accused let you go?

A. Yes.

Q. How long was it, before the two men, Mr. Welham and the soldier, came along did Private Smith let you go?

A. A few seconds.

Q. What did Pvt. Smith do after he let you go?

A. He first got his cycle and rode toward Brantham.

Q. That would be in the opposite direction to Manning Tree?

A. Yes.

Q. What did you do?

A. I didn't know there was anyone coming up and I thought he was still somewhere about.

194 Q. Then what happened?

A. First Mr. Welham and the soldier went by a little way and came back again. I was trying to pick me bike up.

Q. What was your condition at that time?

A. I didn't know what I was doing.

Q. Were you crying?

A. Yes.

Q. Did you have some conversation with Mr. Welham?

A. He only asked me what happened and I told him.

Q. Who took you home?

A. Mr. Welham lived in the opposite direction and the soldier came home with me.

Q. About what time was it you got home?

A. Quarter past 11.

Q. Who did you see at home?

A. My father and mother.

Q. Did you tell them what happened?

A. Yes.

Q. The next day did you look at yourself to see if there were any marks on your body?

A. Yes.

Q. Where were those marks if any?

A. There were bruises on my left shoulder; I was stiff all over; there was a swelling at the right side of my throat and bruises on my legs.

Q. Where were the bruises on your legs.

The witness indicated the area between the knee and ankle, on the left leg.

Q. Were there any bruises on your right leg?

A. One on my foot and some here, but the left leg was the worst.

Q. After the 11th of July 1944, did you see the accused again?

A. No.

Q. Did you see him about a week later?

A. No.

195 Q. Did you see him here at the Raydon Aerodrome?

DEFENSE. Object to that.

LAW MEMBER. Overruled.

DEFENSE. May I ask that he place a time on that.

PROSECUTION. That was my next question.

LAW MEMBER. You can't dictate what the Trial Judge Advocate will ask.

PROSECUTION. Did you see him at the Raydon Aerodrome?

A. Yes.

Q. How long after the 11th of July was it?

A. Exactly a week.

Q. Was he in a line of men at that time?

A. Yes.

Q. At that time did you see Sheila Winifred Dale there at the Raydon Aerodrome?

A. Yes.

Q. Did she go with you at the same time you identified the accused at the Raydon Aerodrome?

A. No.

Q. You went alone, is that right?

A. Yes.

Q. How many men were standing there in line?

A. 15.

DEFENSE. I object to this line of questioning in reference to the identification parade. It is thoroughly incompetent, not part of the *res gestae* and I ask that it be stricken from the record.

LAW MEMBER. Objection overruled.

PROSECUTION. Did you then identify the accused?

A. Yes.

Cross Examination.

Questions by DEFENSE.

Q. Where were you walking when you first saw the defendant?

A. I was going to walk from the house I was at as far as the Crown.

196 Q. You were at Mrs. Kerry's house?

A. No, Mrs. Watson's. Mrs. Kerry lives with Mrs. Watson.

Q. How far is that from the Crown?—About what time was it you started out?

A. Half past 10.

Q. How long did it take you to walk to the Crown?

A. About 7 or 8 minutes.

Q. Shortly after you reached the Crown you met the defendant?

A. Just before I reached the Crown.

Q. You then were with Mrs. Kerry?

A. Yes.

Q. What did the defendant say to you or Mrs. Kerry and what did you answer?

A. I didn't answer him at all.

Q. What did he say?

A. He asked if he could see me home.

Q. Did he assault you at that time?

A. No.

Q. Did he appear under the influence of liquor?

A. I don't know anything about it.

Q. When he spoke to Mrs. Kerry and you was he most respectful?

A. I don't know how to answer that question.

Q. He wasn't nasty, was he?

A. In what way do you mean?

Q. Was he indecent?

A. No.

Q. He asked if he could walk you and Mrs. Kerry home?

A. He asked if he could see us home.

Q. What did you say?

A. I didn't answer him.

Q. What did Mrs. Kerry say?

A. "No, thank you."

197 Q. What happened then?

A. He asked Mrs. Kerry if she was my mother and she said no. He asked us where we lived. She said "Here." He said: "You might but she doesn't." He said: "She lives at Manning Tree."

Q. What did Mrs. Kerry then say?

A. Two special policemen were coming down the road and he said something about: "They are always after me" and said "Good night" to the two policemen.

Q. What did the two policemen say to him?

A. "Good night."

Q. Nothing more than "Good night"?

A. No.

Q. Did you say to the two policemen: "This boy is bothering me and wants to see me home"?

A. No.

Q. Did Mrs. Kerry say that he was bothering you?

A. No.

Q. He left you then, didn't he?

A. Yes.

Q. You and Mrs. Kerry proceeded together?

A. No, she said: "Good night."

Q. Who left first—Mrs. Kerry or this boy?

A. He moved off and she said "Good night" to me and went home.

Q. When Mrs. Kerry left, did you get on your bicycle?

A. Yes.

Q. And started to pedal on?

A. Yes.

Q. About what time was this?

A. Getting on to 20 to 11.

Q. How far had you gone from Mrs. Kerry when this boy came to you again?

A. Just before you get to the Crown.

Q. How much later? 5 minutes?

A. No.

198 Q. 10 minutes?

A. No; it was just a few seconds.

Q. Then it was just about 20 to 11 that you started towards the first bridge?

A. Yes.

Q. Did you ride over the first bridge to go with him?

A. No.

Q. What happened?

A. I just had an idea he was going to follow me—I don't know any Americans and have never spoken to them. He caught me up between the first bridge and the second bridge.

Q. Which side of the road were you riding on?

A. The left.

Q. Which side was he?

A. On my right side.

Q. Meaning you were closer to the grass on the side than he was?

A. Yes.

Q. How long did you ride together that way?

A. We didn't ride together. I was riding ahead of him.

Q. Then what happened?

A. He said could he see me home and I said: "No.

thanks." He said: "Please." And I said: "No, thanks," again. Then he rode his bike into me.

Q. What part?

A. Into my front wheel.

Q. Did that cause you to go over on the left hand side?

A. Yes.

Q. Did you fall off your bike?

A. Yes.

Q. When you fell off your bike what did he do? Was he still on his?

A. No, he fell off and grabbed hold of me.

Q. What did he do with the two bikes?

A. The one was on the grass and the other was half on the curb and half on the road.

199 Q. Was anybody in sight at that time?

A. No.

Q. Were any automobiles coming past?

A. No.

Q. In fact, the last individuals you had seen were these two constables going home?

A. Yes.

Q. Were any American soldiers coming along?

A. No.

Q. When you fell off on the left hand side of the road and the two bikes were lying on the ground, what happened then?

A. He grabbed hold of me.

Q. What part of your body?

A. I think it was my shoulders and arms.

Q. Did he grab your both hands and shake you?

A. No, he just dragged me over to the right hand side of the road.

Q. Weren't these two bikes in front of you and in your way?

A. Yes.

Q. What did you do?

A. One bike was here and the other there. I had one leg on either side of my cycle and he pulled me over and that is how I came to bruise the inside of my left leg.

Q. He picked you up physically from underneath the bicycle?

A. I wasn't underneath the bicycle.

Q. You say you had either leg on the bicycle?

A. Yes, but not underneath it.

Q. What happened then? How did he drag you—by the arm or pull you?

A. He pulled me by one arm and twisted it here. I pulled his hair.

Q. In that fashion you crossed over this road?

A. Yes.

Q. When you got to the other side of the road, what happened?

A. There is a little bank and a field—a corn field.

200 He dragged me into this corn field.

Q. About how far from the road is the corn field?

A. Just the road, the pavement and then the corn field.

Q. From the road, it would be about 6 or 8 feet? From where I am standing to where you are sitting?

A. No, a little farther.

The space indicated was about 10 or 12 feet.

Q. He kept on twisting your arm?

A. No because I struggled and he just grabbed hold of me.

Q. Did you try to kick him?

A. Yes.

Q. Did you try to kick him in the crotch?

A. No.

Q. Were you standing right up against him at any time so that you could have kicked him?

A. No.

Q. Was he pushing you in this fashion? (Indicating his arm behind his back.)

A. No.

Q. I can't understand the position you held to one another. When you finally got across the road and started into the field, what happened then?

A. We just went on struggling and I lost my balance.

Q. You fell on the ground?

A. Yes.

Q. While you were lying on the ground, he was standing up?

A. Yes.

Q. And he just kicked you?

A. Yes.

Q. Where were his hands?

A. I don't know; I didn't very much notice.

Q. Is that when he muttered these intimacies to you?

A. No, when I first fell off the bicycle.

201 Q. When he got you into the corn field, did you try to cajole him or laugh with him or kid him out of it?

A. No.

Q. When was it you bit his hand?
A. I managed to get away.
Q. You got back from the corn field on to the pavement?
A. Yes.
Q. Then what did you do?
A. I bit his hand.
Q. What did he do?
A. He swore and grabbed my throat.
Q. Did he try to pull you into the field?
A. Yes
Q. Did you get back into the field?
A. No.
Q. Why?
A. By that time I was half way on the road.
Q. This was about 10 of 11, wasn't it?
A. Yes.
Q. How much longer did you struggle with him?
A. Not very long.
Q. Another 3 or 4 minutes?
A. About that.
Q. Then you got up and he saw these two people coming?
A. Yes, he saw them coming.
Q. You are sure you didn't see them coming?
A. I had my back toward Brantham.
Q. And they were coming from Brantham?
A. Yes.
Q. What did he say to them?
A. He didn't say anything.
202 Q. What did you do?
A. By that time I didn't know what I was doing. I didn't know what was happening. I was too terrified. I was afraid and thought he was still around. He just gave me a push and I fell on my bike.
Q. You finally grabbed your bicycle and got on it?
A. No, he gave me a push.
Q. Were you on your bicycle when he pushed you?
A. No.
Q. Where were you? A. On the left hand side.
Q. When he pushed you, when you were right near the cycle he pushed you and then he left, didn't he?
A. Yes.
Q. Did you make a date to meet him again?
A. Certainly not.
Q. You say you bit him on the right hand?
A. I didn't say I bit him on the right hand. I just said I bit his hand.

Q. You made a statement to Lt. Todd, the Investigating Officer, and at that time you said you bit him on the right hand.

A. I don't remember.

DEFENSE. Let me refresh your recollection. I hand you the statement you made to Lt. Todd and ask you to look at it. Is that the statement you made to him?

A. Yes.

DEFENSE. I ask that it be marked and received in evidence.

LAW MEMBER. The statement will be admitted in evidence as Defense Exhibit B.

DEFENSE. I will read from this: "I screamed again and he put his hand over my mouth and said 'Shut up'. I bit his right hand and he caught me round the throat."

DEFENSE. How many statements did you make to Mr. Felton with reference to this crime?

A. One.

Q. When you made the statement to him, he took it in his notebook, didn't he?

203 A. Yes.

Q. Then when you came before Lt. Todd at that investigation, when the defendant asked you one or two questions, you told Mr. Felton you thought the statement they showed you was not the statement you made originally, didn't you?

A. I don't understand you.

Q. You made two statements in this case: the first was the special constable, the policeman. Then Mr. Felton came up and you made another statement. Mr. Felton said he didn't like the first statement and that was the reason you made the second statement.

A. No.

Q. Why did you make the second statement?

A. Because the first one was to a special constable.

Q. Do you remember the name of this special constable?

A. No.

Q. Was it Mr. Shepherd?

A. I don't know.

DEFENSE. I wish to call upon the Prosecution to produce the statement made by this witness to the Scotland Yard police. This one is the second one.

PROSECUTION. I don't believe I have it. To whom was it made?

DEFENSE. I don't believe it was made. There was a prior

statement made and he said it was inconsistent. Was it the second police officer you spoke to?

WITNESS. Yes.

Q. Do you remember speaking to a first police officer? He took certain notes didn't he?

A. Yes.

Q. Where did he take them?

A. At the police station at Mistley.

Q. When he finished taking those notes, did you sign his little book? Just as your signed Mr. Felton's later?

A. I don't remember.

Q. You remember making a statement to the first police officer, don't you?

A. Yes.

204 PROSECUTION. Have you seen the first statement?

DEFENSE. I have heard a great deal about it.

PROSECUTION. I object to the Counsel stating she has made statements which are inconsistent with the statement made now.

LAW MEMBER. I think the court understands that is not evidence. It will be disregarded by the court for any consideration whatever.

DEFENSE. At the time of this identification parade, when these 15 American soldiers were lined up, was there a C. I. D. agent or another American officer or a non-commissioned officer—I believe he was—standing and talking to this boy? When you walked out of this room into the yard where the 15 men were lined up, there was somebody standing and talking to this defendant, wasn't there?

HJMcN DPG

A. No.

Q. He was standing by himself?

A. No, he was standing in the middle of the line.

Q. Didn't you get out just to the beginning of the line, and he was standing in the middle of the line, and you saw him and there was somebody standing next to him and you broke down, isn't that what happened?

A. There was nobody talking to him when I went out.

Q. When you walked out there and the 15 men were lined up, was there a civilian standing there with his arm on this boy's shoulder?

A. No.

Q. Did you see any civilian standing in front of these 15 people at all?

A. One came up and told me what to do.

Q. What did he tell you to do?

A. He said: "When you pick him out, touch him."

Q. Where did he come from—the end of the line or was he standing in the middle of the line?

A. He was standing opposite the doorway.

Q. Was he standing in front of this accused?

A. No.

Q. Did you get a chance to look at the 15 men standing on the line there?

A. When the American in plain clothes told me what to do, I turned around and saw him immediately.

Q. Was he the only blond boy standing there?

A. I didn't see anybody else.

205 Q. He was the first blond, fair-haired boy you saw?

A. Yes.

Q. Did you notice any other men of the same size of this accused standing there, or was he taller than all the rest?

A. I just saw them and didn't look at any of the others.

Q. Did you notice whether or not any of these other boys were boys you had seen in Brantham or Manning Tree previously?

A. I have never spoken to Americans, I have never taken any notice of them.

Q. You have certainly seen certain Americans around town?

A. Yes.

Q. Could it have been some of these boys standing in this parade were boys you had seen in Brantham or Manning Tree?

A. No.

Q. You had never seen any of them?

A. No.

Q. You had seen him previously?

A. No.

Q. You had never seen him at a public house?

A. I never drink.

Q. Did you ever see him with Sheila Dale?

A. No.

Q. Have you ever seen him on a bicycle in town?

A. No.

Q. Have you ever seen him drunk?

A. No.

PROSECUTION. Miriam, when you went out to the identification parade, after you identified the accused, did you then walk along the line and look at the other men?

A. Yes.

Q. Did you look at each man separately as you went along the line?

A. Yes.

Q. After you picked out the accused—are you sure the man you identified today is the man who attacked you?

A. I would never forget his face.

Q. You are sure?

A. Yes.

206 Examination by the COURT.

President of COURT. Tell me about this man who attacked you and who you later identified in the line,—what about his uniform or face that made you sure that was the same man?

A. When I walked right up in front of him, he narrowed his eyes—the same as he did when he attacked me.

Q. You recognize friends by their appearance, by their face or clothes. What things about this man made you think he was the one?

A. I knew he had a roundish face and fair hair and knew when I saw him again—I recognized him.

Q. When you identified him in the line, did you see his teeth?

A. No.

Q. Is there anything else that happened the evening you were attacked that you haven't told us about? Something that hasn't been brought out by the questions? Anything that the man who attacked you did?

A. No.

Q. You have told us all you can remember?

A. Yes.

LAW MEMBER. Miss Cullum, at the time this assault took place, was it dark?

A. It was getting dusk.

Q. Do you remember what the black out time was on July 11th?

A. No.

Q. Was it about dusk when this assault took place, did you say?

A. It was only first getting dusk.

Q. At the time the assault took place, did you see the teeth of the man assaulting you?

A. Yes.

Q. You noticed several teeth were missing?

A. Yes.

Q. Did you ever know Sheila Dale before this trial came up?

A. I used to know her at school.

Q. Was Sheila Dale on the camp so far as you know when you identified the accused?

A. Yes.

Q. Did you see her here?

A. Yes.

207 Q. Did you identify the accused in the company of Sheila Dale?

A. No.

Q. Who went out first to look at the identification parade —you or Sheila?

A. I did.

Q. Where was the identification parade held? Did they have the men lined up in a building?

A. No.

Q. Outside?

A. Yes.

Q. Did you come from a room and go out and look at them?

A. Yes.

Q. Was Sheila Dale in the room when you went out?

A. Yes.

Q. When you came back did you tell her you had identified the man?

A. No.

Q. You didn't say anything to her at all about it?

A. No.

Q. When you first gave the police a description of the man who had attempted to assault you, had you talked to Sheila Dale before that?

A. No.

Q. Have you and Sheila Dale ever compared descriptions of the man that assaulted you?

A. I don't think so.

Q. I believe you said to the best of your knowledge you had never seen the accused before July 11th,—is that correct?

A. I am sure I had never seen him before.

Q. Was it during the time he was attempting to assault you or using force on you, that you saw his teeth?

A. No. The first time I noticed his teeth was when he came up to me.

Q. When he was talking?

A. Yes.

Q. At the time you identified the accused in the identification parade, did you see any mark or injury on his hand?

208 A. No.

Q. Do you know what part of his hand—I don't mean the right or left hand—but what part of his hand you hit?

A. It was the fat part of his hand on the inside.

Q. Beneath the base of the thumb, do you think?

A. Yes.

Q. You have told us to the best of your knowledge what time these various incidents took place. Do you have any means of fixing that time or is that just your best estimate of the time?

A. I just guessed at the time.

Q. Do you recall specifically the time that you left—I believe it was Mrs. Kerry's house?

A. Just after half past 10.

Q. Did you see the clock before you left?

A. Yes—because I noticed it was getting late and I should have been in at 10.

Q. You planned to leave at half past 10?

A. No, I planned to leave at half past 9.

Q. You did notice the time specifically before you left the house?

A. Yes.

Q. Or at the time you left the house?

A. Yes.

Q. When you saw the men lined up in the identification parade, did you immediately walk over and place your hand on the accused?

A. No. I was too frightened.

Q. Did you immediately designate him as the one who had attempted to assault you?

A. Yes.

Q. Before you identified him, did you walk down the line and look at them all?

A. No, I saw him first.

Q. Did you smell any whiskey or beer on the breath of the man that assaulted you? Or could you tell about that?

A. No, I couldn't tell.

209 President of Court. Were the black out curtains drawn at this house before you left? Was the black out on before you left the house?

A. I don't remember.

Q. Was the black out—Was it black out time when you got home?

A. Yes; it was a quarter past 11 when I got home.

Q. How do you know that time?

A. My father was waiting up for me.
Q. He remarked on the time, did he?
A. Yes.
Prosecution. What do you weigh, Miriam?
A. 8 stone 6.
Q. How many pounds in a stone?
A. 14.
The witness was then excused and withdrew from the room.

William Frank Albert, "Bibury", Harwich Road, Lawford, a British civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination

Questions by the Prosecution.
Q. What is your name?
A. Frank Albert Welham.
Q. Where do you live?
A. "Bibury", Harwich Road.
Q. Where are you employed?
A. At the B. X. Plastics, Brantham.
Q. Calling your attention to about 11:10 on the evening of 11 July 1944, where were you at that time?
A. Going from Brantham to Manning Tree.
Q. Were you near any house or cottage at this point?
A. Yes—there was a house on the right hand side.
Q. Do you know the name of that cottage?
A. No, sir.
Q. Who was with you?
A. Bombadier Carter.
Q. Where were you going?
A. Home to Lawford.
Q. When you got in the vicinity of the cottage you have described, did anything unusual happen there?
A. Yes. I saw a cycle on the opposite side of the road, i. e. the left hand side.
Q. Did you see anything else?
A. I heard a girl crying.
Q. What did you do?
A. I got off my bike, picked the girl up—I thought she had had an accident.
Q. Did she say anything to you at that time?
A. Yes. I said: "What is the matter?" and she said: "A Yank hit me on the head several times."
Q. What was the appearance of her clothing?

A. She was half in the grass and half in a sitting-lying position. Her clothing was ruffled.

Q. Did you notice anything else about her clothing?

A. No, sir.

Q. What did you do after the girl had spoken to you?

A. I picked her up and tried to console her. She was shaking and in a nervous condition.

Q. Then what happened?

A. We tried to get the girl on her cycle, walked a few yards with her. Then Bombadier Carter carried on into Manning Tree with her.

Q. Was she crying?

A. She was sobbing nearly up to the Railway Tavern. That is where I left her.

Law Member. Do you know the name of the girl?

A. Her name was Callum. I knew the girl.

21P Cross-Examination.

Questions by Defense.

Q. Can you tell us definitely what time it was you saw the girl lying in the grass?

A. I only estimated the time.

Q. How did you estimate it?

A. I knew the time I left Brantham.

Q. What time was that?

A. 10 to 11.

Q. How long did it take you to get there?

A. I would say a few minutes, or five minutes past 11.

Q. Did she tell you the Yank had just left her?

A. Yes.

Q. Did you see the Yank?

A. I saw a Yank between the bridges. Right in the middle of the two bridges.

Q. About 25 yard from where you found the girl?

A. More like 200 yards, I would say.

Q. A journey of about two or three minutes?

A. I would say about 5 minutes.

Examination by the Court.

Law Member. Is your name Welham?

A. Yes, sir.

Q. Did the girl give you a description of the man who attempted to assault her?

A. None at all, sir.

CARTER, CECIL, Corporal, Bombadier, Stockbort, Cheshire, England, a British soldier, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?

A. Cpl. Bombadier Carter—Cecil Carter.

Q. Where do you live?

212 Q. Where are you now stationed?

A. Manning Tree.

Q. Calling your attention now to approximately 11 o'clock in the evening on July 14th, where were you at that time?

A. Cycling along the road from Brantham on the way to Manning Tree.

Q. Who was with you?

A. Mr. Welham.

Q. Are there any houses along that roadway?

A. There is a house on the road.

Q. Do you know the name of that house?

A. No, sir.

Q. Are there any other houses in the vicinity nearby?

A. No, sir.

Q. As you reached that house, or somewhere in that vicinity, did anything unusual occur?

A. Well we were cycling along the road and found this young lady on the roadside.

Q. Where was she on the roadside?

A. Approximately opposite the house that stands on the right hand side.

Q. What was her condition?

A. She was nervous and shaking.

Q. Did you see her clothes?

A. No, sir.

Q. Was she crying?

A. Yes.

Q. Did she say anything to you at that time?

A. The only words I can recall her saying was: "I have been attacked by a Yank."

Q. Before you saw the young lady did anyone pass you going toward Brantham on the way you were traveling?

travelling

eN A. There were some ~~passengers~~ in the opposite direction.

Q. Do you know who that was?

A. Actually three passed us. Two American soldiers and one American soldier cycling on his own.

213 Q. Who passed you first?

A. The two American soldiers.

Q. About how much time elapsed between the time the two Americans passed you and the other single American passed you?

A. I should say a matter of 3 or 4 minutes.

Q. Where was it the one American passed you? Where were you?

A. On the road from Brantham to Manning Tree. Just past the place they call the white bridge.

Q. How long was it after that you saw the young lady?

A. A matter of a minute or so.

Q. You were in the company of Mr. Welham at that time?

A. Yes, sir.

Q. What did you do regarding the young lady?

A. We didn't know it was a young lady at the time. We were passing along the road and heard somebody sobbing and turned back. We wanted to know what was the matter, we picked the young lady up. She was sobbing and she told me she had been attacked by a Yank. We tried to console her the best we could. We got her on to her cycle and saw the young lady home safely.

Q. Did you take the young lady home?

A. Yes.

Q. At what time did you arrive at her home?

A. I would say roughly a quarter past 11.

Q. Do you know where the short cut is to Manning Tree on the bridge?

A. Yes, sir.

Q. Was it on the Brantham side or the Manning Tree side these two Americans passed you?

A. The Brantham side.

Examination by the Court.

Law Member. Did the young lady give you a description of the man who attacked her?

A. No, sir. It was getting dark at the time.

Q. When you arrived home, did she give you a description of the man who attacked her?

A. No, sir.

Q. Could you identify, or name the American soldier you saw that night around 11 o'clock?

A. No, sir.

Q. Was it dark?

214 A. It was getting dusk.

President of Court. Did you have your bicycle light turned on?

A. No, sir. I haven't got a light.

Q. Did the other bicycles that passed you have lights on?

A. I can't remember, sir.

Q. Did your friend have his lights on?

A. I couldn't tell you.

CULLUM, HERBERT ARTHUR, 57 Colchester Road, Lawford, a British civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?

A. Herbert Arthur Cullum.

Q. Where do you live?

A. Lawford.

Q. You are the father of Miriam Cullum?

A. I am.

Q. Calling your attention to the approximate time of about 11 o'clock on the evening of 11 July 1944, did you see your daughter at that time?

A. I should say it was 10 past 11.

Q. Where did you see your daughter?

A. I heard her coming indoors and I was coming downstairs to meet her. I had been waiting for her.

Q. When you saw her, what was the condition of her clothing? A. I didn't take much notice of her clothing, to tell the truth. She was crying.

Q. Did she say anything to you at that time?

DEFENSE. Objected to as incompetent. It doesn't form part of the *res gestae* and certainly there was a long interval of time between the time of the alleged act and this time.

LAW MEMBER. Objection sustained.

PROSECUTION. If the witness were allowed to answer the question, he would testify that his daughter, Miriam Cullum told him she had been attacked by a Yank and would enumerate the facts of the attack as told to him by his daughter.

215 PROSECUTION. The next day after the 11th of July, did you notice any marks on your daughter's person?

A. Only on her neck.

This portion made outside the hearing of the court 11 Jan 45 JPG

Q. What did you see?

A. Bruises on her neck and they were swollen.

Q. Did you examine her legs?

A. No.

Q. At some later date did you look at her legs?

A. She did show them to me a day or two after.

Q. When she showed her legs to you, what if anything did you see?

A. There were bruises on her legs.

Q. Could you tell the court where the bruises were?

A. On the top (indicating somewhere between the knee and ankle).

Q. Do you remember the color of the bruises?

A. I should say they were blue—I should think.

Q. They weren't yellow?

A. No.

Q. How long did the swelling around her neck remain, to your knowledge?

A. Several days.

Q. Did you see your daughter's neck when she left home on 11th of July?

A. I didn't take notice.

Q. Do you know whether or not her neck was swollen before?

A. No.

DEFENSE. Objected to. He said he didn't take notice. I ask that the answer be stricken and the court instructed to disregard it.

LAW MEMBER. The court will be so instructed.

LAW MEMBER. Will Mr. Cullum be further called as a witness?

DEFENCE and PROSECUTION. No.

LAW MEMBER. (*To Mr. Cullum*) If you would like to, you may take a seat in the court room and listen to the rest of the proceedings.

The witness was then excused and took a seat in the court room.

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216 GOODALL, BETTY, of No. 45, Peel Road, Wembley, a civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION:

Q. What is your name?

A. Betty Goodall.

Q. How old are you?
A. 16.
Q. Where do you live?
A. 45, Peel Road, Wembley.
Q. On the 11th of July 1944, where were you staying at that time, Betty?
A. Marsh Cottage.
Q. Where is the Marsh Cottage?
A. At Lawford, near Manning Tree.
Q. It is on the road from Brantham to Manning Tree?
A. Yes.
Q. Which side of the road going toward Manning Tree is the cottage located?
A. On the right.
Q. Are there any other houses around there?
A. No.
Q. What time did you go to bed that evening?
A. About half past 10.
Q. From half past 10 to 11 o'clock what did you do?
A. I was reading.
Q. At about 11 o'clock did you hear anything?
DEFENSE. Objected to. At this time I should like to object to the testimony of this witness—what she would testify to—on the ground there is no proof—anything she heard may have come from six different sources other than the alleged scene of the crime.
LAW MEMBER. That is a matter which concerns its probative force and for that reason objection is not sustained.
WITNESS. I heard a scream about that time.
217 Q. How many screams did you hear?
A. Two.
Q. From where did the screams seem to come?
A. They seemed to come from the walls.
Q. Where are the walls?
A. On the front of the house.
Q. Which way does the front of your house face?
A. Toward the roadway.
Q. About how far did the screams seem to be?
A. In the distance.

Cross Examination.

Questions by DEFENSE.
Q. Betty, to whom did you first make this statement?
A. I think it was Police Constable Felton.
Q. Did he come to see you?
A. Yes. I met him down at Manning Tree.

Q. He sent for you?

A. I just met him.

Q. What did he say to you and you to him?

A. He asked me if I was the girl from Marsh Cottage? I said: "Yes." He asked me if I had heard anything.

Q. Did he tell you you heard two screams?

A. No, he didn't. He just asked me if I heard anything.

Q. How did you know this was the night of the 11th? When did you meet him?

A. Two days afterwards.

Q. Did he ask you whether or not you heard screams two nights before?

A. Yes, on the 11th.

Q. Did he tell you where the screams came from?

A. No. He just asked me if I heard anything.

Q. Was anybody else at home with you at that time?

A. My mother, grandmother and Uncle Ted.

Q. Did your mother hear any screams?

A. No.

218. Q. Did your grandmother?

A. No.

Q. Did your Uncle Ted hear any screams?

A. No.

Q. When you heard the screams did you call for your mother?

A. I called Mother and she said it was probably somebody coming home from the dance.

Q. What did it sound like—like somebody having a gay party?

A. No; it just sounded ordinary.

Q. Did it sound frightened?

A. No.

Q. You just heard a loud shout?

A. It was a scream.

Q. Like boys coming home drunk will shout?

A. It was just an ordinary scream.

Q. It didn't have any fright to it?

PROSECUTION. I object. He is asking for a conclusion on the part of the witness.

LAW MEMBER. That is a matter of common observation. That is all right. Objection overruled.

DEFENSE. Did it appear to you the one who shouted was frightened?

PROSECUTION. Object to that. How can she tell?

LAW MEMBER. I think this is relevant. Don't let the lawyers give you an opinion you didn't have before.

DEFENSE. You remember testifying you said there was no fright to it?

A. Yes.

Q. You still say that?

A. Yes.

Examination by the Court.

President of Court. Was the scream—was it a woman's voice or a man's?

A. A woman's I should think.

Q. How do you judge that? Was it high or low tone?

219 A. I was lying in bed and reading a murder book and didn't take any notice of it.

LAW MEMBER. What time did you hear the two screams?

A. About 11 o'clock.

Q. Did one follow quite closely to the other?

A. Yes.

DEFENSE. You say you were reading a murder mystery?

A. Yes.

Q. Could it have been you didn't hear screams at all and it was part of the book?

A. No.

Q. You are not really sure, are you?

A. I really think they were screams.

Q. You are not too sure?

PROSECUTION. I object. She has answered him twice.

LAW MEMBER. Yes, she has answered the question.

Member of Court. Betty, is it pretty noisy on that road at 11 o'clock from soldiers coming back from Manning Tree or is it fairly quiet?

A. It is not noisy. Just ordinary.

Q. These screams are something that stuck in your mind? It is not something that happens once a week or oftener that you hear this kind of a noise? I know a lot of soldiers go back and forth, but I want you to tell me, is it unusual for you to hear a noise like this at night—these screams?

A. You often hear people shouting around there.

LAW MEMBER. Betty, how do you fix the time at 11 o'clock?

A. I had been in bed about half an hour. We had no clock in the room.

Q. You know you went to bed at 10:30?

A. Yes.

Q. You looked at the clock?

A. Yes.

Q. 11 o'clock is just an estimate between the interval you went to bed and the time you heard the screams?

A. Yes

220 FELTON, WILFRED JOHN, police constable, Mistley, Essex, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

Q. What is your name?

A. Wilfred John Felton.

Q. What is your business?

A. Police constable, Essex Constabulary.

Q. Where are you stationed?

A. Mistley.

Q. Calling your attention to the 12th of July 1944, did you make a certain investigation at that time?

A. I did, sir.

Q. I hand you what has been marked Prosecution's Exhibit 1 and ask if you can identify Prosecution's Exhibit 1.

A. Yes.

Q. What is it?

A. The skirt I obtained from the witness Dale.

Q. What is the witness Dale's first name?

A. Sheila Winifred.

Q. I hand you now what has been marked Prosecution's Exhibit #2. Can you identify it?

A. I can.

Q. What is it?

A. A pair of knickers I also obtained from the witness Dale.

Q. That is the witness Dale you referred to?

A. Yes.

Q. Where did you obtain the exhibit?

A. From Dr. Beckett at Manning Tree.

Q. Who was present?

A. I am not sure whether Dr. Beckett had left or not, but I had been there and I asked Miss Dale to go home and fetch the clothing.

221 Q. On the afternoon of that day, did you make a further investigation?

A. I did, sir.

Q. Where did you go?

A. To the Ipswitch Road, Lawford.

Q. At what point did you go?

A. To a point 10 feet on the Suffolk side of a telegraph pole—A-29—and 6 feet on to the grass verge.

Q. Did you see anything at that point?

A. I did.

DEFENSE. Objected to on the ground that they are going to attempt to prove a state of affairs on the date of the investigation. There is no presumption that the condition, as they found it then, was the same as after the alleged crime. I ask in the absence of proof that the condition remained the same—that a guard was posted to keep it remaining the same—that no evidence be received now where the witness will testify how it was a day later.

LAW MEMBER. Objection overruled.

PROSECUTION. What did you see?

WITNESS. I saw where the grass and some tall weeds had been broken down as if some person had been lying there.

Q. At which side of the road, going toward Manning Tree, was this area?

A. On the right side of the road. Going toward Manning Tree it would be the left hand side.

Q. Are there any houses here?

A. One only.

Q. What house?

A. Marsh Cottage. It is about 100 yards away, on the opposite side of the road.

Q. What is the condition of the surrounding country?

A. Very open.

Q. Are there any other houses around there?

A. None nearer than the Manning Tree railway station.

Q. The station is approximately how far from this spot you saw on the road?

A. 250 to 300 yards.

Q. On the 17 of July 1944 did you see a person known as Miriam Florence Cullum?

A. I did.

Q. Where did you see her?

222 A. At her residence.

Q. Did you see any portion of her body?

A. Only that which was visible to me.

Q. Did you notice anything about that portion which was visible?

A. I noticed the right side of her neck was swollen.

Q. Did you see any other marks on her person?

A. No, sir.

LAW MEMBER. What day was that?

A. Monday, the 17th.

LAW MEMBER. Was that the first time you saw her?

A. Yes.

PROSECUTION. Did you on the 12th of July see a person known as Sheila Dale?

A. Yes, sir.

Q. Did you examine any portion of her body?

A. I didn't examine her but I was shown some bruises when in surgery.

Q. Where were those bruises located?

A. On the thighs.

Q. Did you see any other marks on the body of Sheila Dale?

A. No, sir.

Q. On the 18th of July did you come to the station here?

A. I did, sir.

Q. Did you see the accused at that time—Private Smith?

A. I did, sir.

Q. Do you see the accused in this room now?

A. Yes, sir.

Q. Where is he seated?

The witness indicated the accused.

Q. At that time did you examine any portion of the accused's person?

A. I asked him to show me his hands.

Q. What did he do?

A. On the ball of the left thumb there was a wound scab.

223 Q. Could you indicate to the court where that was?

The witness indicated the fat part of the left thumb.

Q. Did you see any other marks on the person of the accused, Smith?

A. No, sir.

DEFENSE. I should like to move to strike out the question as to "Did you see any wound on his hand" also the response, unless a proper predicate is laid. That is certainly incriminating and before a defendant may be called upon to incriminate himself, he must be advised as to his rights.

PROSECUTION. He can tell what he saw.

LAW MEMBER. (To Defense) Your theory about the law is stretching it.

DEFENSE. The defendant was forced to show his hands.

LAW MEMBER. Was he forced to show his hands?

DEFENSE. He asked to see them.

WITNESS.

H I M N D P G. ~~LAW MEMBER~~. No force was used.

DEFENSE. (To witness) When you say you didn't force him, you mean you didn't twist his arm.

WITNESS. Correct, sir.

DEFENSE. But you did say: "Show me your hands."

A. I did.

Q. You didn't give him any opportunity to refuse to show them.

A. He never refused.

Q. You said: "Show me your hands."

A. I did.

Q. Did you advise him of having committed a serious offense?

A. I did not.

Q. Did you tell him what the penalty was?

A. I did not.

LAW MEMBER. Was he suspected of a serious offense at that time?

WITNESS. Not at that time, sir.

LAW MEMBER. Objection overruled.

PROSECUTION. On the 18th of July 1944 were you present when an identification parade was held?

A. I was.

224 Q. Where was it held?

A. At this base.

Q. Did you see the person known as Sheila Dale there?

A. I did.

Q. What, if anything, did you see the person known as Sheila Dale do at the time the identity parade was held?

A. I walked with her along the road and she picked out Smith as the man who assaulted—

DEFENSE. I object to that and to the answer. The question was "What did you see her do." The statement that she picked out the man who assaulted her is hearsay and nothing more and there is no theory to sustain it otherwise.

LAW MEMBER. The purpose of the identification parade was to pick out a man whom she had said had assaulted her and for that purpose, I think it is competent and the objection is overruled. The court is instructed there is no proof that the young lady was assaulted by anyone, but merely that she picked him out as having assaulted her. Objection is overruled.

PROSECUTION. At that time, did you see the person known as Miriam Florence Cullum there?

A. I did.

Q. At the time you accompanied the person known as Sheila Dale, when she identified the accused, was the person known as Miriam Florence ~~Dale~~ Cullum present?

J McN P G

A. No, sir.

Q. Do you know where she was? A. Yes, sir.
Q. Where was she?
A. In Lt. Todd's office.
Q. Where is Lt. Todd's office located with relation to where the identification parade held?
A. It was to the right of the Leftenant's office. Outside the building and to the right.
Q. Do you know whether or not from the office of Lt. Todd anyone could see the soldiers lined up in the parade?
A. No, sir; they could not.
Q. How do you know?
A. You can't see out of the window—not at the bottom.
225 Q. How many men were lined up in the parade?
A. 16 altogether.
Q. Do you remember how they were dressed?
A. Yes, sir.
Q. How were they dressed?
A. Their trousers, with their hats under the lapels—
Q. Do you remember the color of the hair of the various men in the identification parade?
A. I couldn't see the color of all of them.
Q. Were they all brunettes or some blonds?
DEFENSE. I ask that Prosecution not lead this witness.
LAW MEMBER. Objection sustained.
PROSECUTION. Can you tell the court the type of hair on several of the men?
A. Fair and dark.
Q. How would you describe the accused's hair?
A. Fair, inclined to be dark.
Q. At a later time did you see the person known as Sheila Dale at the time of the parade?
A. Yes, sir.
Q. After the person known as Miriam Florence Cullum identified the accused where did she go?
A. She went back to Lt. Todd's office.
Q. Did the person known as Sheila Dale then come out?
A. Yes, sir.
Q. At what time did Sheila Dale come out. How soon after the person known as Miriam Cullum had identified the accused?
A. Only a minute or so.
Q. Do you know whether both Sheila Dale and Miriam Florence Cullum passed each other outside as they were going to and from the identification parade?
A. I can't say that, sir.

Q. What, if anything, did you see the person known as Sheila Dale do regarding the parade?

A. She walked along the row of soldiers and picked out a man out.

226 Q. Whom did she pick out?

A. The man now accused.

Q. Who is that?

A. That man there.

Q. Do you know his name?

MCM G A. Yes; that is Smith. (Indicating the accused)

DEFENSE. Defense does not desire to ask any questions but renews his motion that all this testimony of this witness, in regards to the identification parade be stricken on the grounds that it is incompetent.

LAW MEMBER. Overruled.

PROSECUTION. Constable Felton, were you present before the men were lined up—before they were in line?

A. Yes, I was here some time before they were lined up.

Q. Were you present at the time the accused, Smith, came upon the scene where the identification parade was to be held?

A. I was standing outside towards the office when he came out.

Q. Do you know whether or not the accused, Smith, was told to go to a certain spot, or what the circumstances were as to his being placed in the identification line?

A. I don't know.

DEFENSE. Defense desires to state for the purposes of the record, it will not cross examine the witness on the matters before stated for the reason that it would be prejudicial to our position.

LAW MEMBER. As you may elicit anything from this witness by cross examination, you are taking a chance you are not called upon to take, because the cross examination of a witness by incompetent questions which have been ruled competent does not change your position. If it is incompetent, your cross examination would not prejudice you in any way.

PROSECUTION. I think we should inquire of the accused whether he desires to cross examine the witness.

ACCUSED. No.

LAW MEMBER. Private Smith, your counsel has objected to certain parts of the examination and answers of Constable Felton. His objections have been overruled—that is some of them have. He has refused to cross examine

the witness, as the court understands it, on the theory
227 that he might diminish the force of his objections or possibly eliminate them. It is very distinctly the court's ruling and the court's idea of the law, so stated for the purpose of the record, that to obtain the benefit of his objections, it is not necessary for the counsel for the Defense to forego examination with regards to matters objected to and that examination may be made without diminishing or without in any way waiving any objection that has been made. Do you care to examine this witness yourself?

ACCUSED. I will abide by the ruling of my counsel.

PROSECUTION. Constable Felton, did you at any time give Prosecution's Exhibits 1 and 2 to anyone?

A. I did.

Q. To whom?

A. To Detective Constable Chaplin.

Q. About what time did you give him Prosecution's Exhibits 1 and 2?

A. The same day I received them.

Q. They never were out of your possession except then?

A. No.

EXAMINATION BY THE COURT.

LAW MEMBER. You say you never talked to Miriam Cullum until the 17th of July?

A. Right, sir.

Q. Had there been any complaint made by her or in her behalf of any matter that happened on the 11th of July—before the 17th of July?

A. Yes, sir.

Q. When was the matter of her complaint brought to the attention of the police?

A. The previous day—on Sunday.

Q. That was the 16th?

A. Yes, sir.

Q. That was the first time a complaint had been made?

A. Yes, sir. But at that time she declined to say to the constable on duty the actual words or what she alleged had been said to her by this man.

Q. That was on the 16th?

A. Yes, sir. When I interviewed her I asked her the words.

Q. You lodged a complaint on her behalf?

A. She came to the police station by herself.

Q. Accompanied by her parents?

A. That I don't know.

228 Q. When you first questioned the accused, what circumstances led you to question Private Smith?

A. That day a number of men were interviewed in Lt. Todd's office and Smith was one of them.

Q. Were substantially the same questions asked all of the men interviewed?

A. Yes, sir—their movements the previous week.

Q. What was the first day you interviewed Pvt. Smith?

A. The first I actually saw Smith was on Thursday, the 13th. I did not speak to him on that day.

Q. When was the first day you spoke to him?

A. I first spoke to him on Tuesday the 18th.

Q. Was that when you noticed the scab on the base of his thumb?

A. Yes, sir.

Q. That was after both Miss Cullum and Miss Dale had identified him?

A. No, sir; it was before.

Q. But on the same day?

A. Yes, sir.

Q. You say you saw Pvt. Smith on the previous day. How did you happen to see him, or was he pointed out to you?

A. He was pointed out while in a public house in Brantham, and I was in there.

Q. When you saw him, it was not in connection with the investigation of the matters in this case? You first spoke to him about the matters involved in this case on the 18th?

A. Yes, sir.

Q. What time on the 18th of July did you first talk to Pvt. Smith? At that time had the identification parade been arranged?

A. No, sir.

Q. As a result of your talk with Pvt. Smith and certain marks you saw upon his person, was the identification parade then arranged?

A. Yes, sir.

Q. At approximately what time was the indentification parade held?

A. Approximately 7:15 P. M.

Q. Was it broad daylight?

229 A. Yes, sir.

Q. You had questioned both Miss Dale and Miss Cullum previous to the identification parade?

A. Yes, sir.

Q. Had both of them given you descriptions of the men who they said had mistreated them or attempted to mistreat them on the 11th of July?

A. Yes, sir.

PROSECUTION. I don't think he understands you.

LAW MEMBER. I meant at some time prior to the 18th did they give him descriptions of the man whom they said had mistreated them on July 11th?

WITNESS. Yes.

LAW MEMBER. Were they both present at the time they gave the description of the man they said mistreated them?

A. No, sir.

Q. On what date did Miss Dale first give you a description of the man she said mistreated her on July 11th?

A. On July 12th, sir.

Q. On what day did Miss Cullum give you a description?

A. On July 17th, sir.

Q. Did you examine or look at the teeth of this accused?

A. No, sir; I did not.

Q. Did you make any request that he open his mouth and show his teeth to you?

A. No, sir; I did not make that request.

Q. The scab wound you found at the base of his thumb on his left hand—was that an incised wound or an abrased wound?

A. It was not that which could be made by the clean cut of a knife. He gave an explanation of that and said it had been made by a cleaver.

DEFENSE. I ask that be stricken.

LAW MEMBER. I think that is competent unless you have some good reason for objecting. Overruled.

LAW MEMBER. Did whatever instrument or instrumentality which caused the wound penetrate the flesh, as opposed to more or less scraping the flesh?

A. It had penetrated.

Q. In other words, whatever caused the wound had made a penetrating wound?

A. Yes, sir.

230 Q. That is opposed to a mere abrasion?

A. Yes, sir.

Q. Who picked the men to stand in the identification parade?

A. The American authorities.

Q. I believe you stated you first talked to Pvt. Smith on the morning of the 18th of July?

A. No, sir, not the morning.
Q. The afternoon?
A. Yes, sir.
Q. About 3:30?
A. About that time.
Q. How many men were brought before you about that time for you to talk to?
A. I actually came over here around about 11 I should say, and anything up to 8 or 9 men had been before us.
Q. Did you interview the men between 11 in the morning and 3:30?
A. A number of them.
Q. Approximately how many?
A. I should say 9 but should not like to be definite.
Q. Were you looking for a man with any particular marks of identification on him?
A. Yes, sir.
Q. What marks of identification were you looking for?
DEFENSE. I object to that as the only marks is the description he got from these two girls and the testimony would be incompetent.
LAW MEMBER. We will strike that. Do you happen to know how the men interviewed by you on the 18th of July were selected for the interview?
A. I do not know, sir.
President of the COURT. Did you call for individuals by name when you were interviewing them?
A. Only one, sir.
Q. Was that Smith?
A. No, sir.
Q. Did you ask to be allowed to interview men with certain physical characteristics, a certain appearance, etc.?
2311 A. Yes, sir.

The witness was then excused and withdrew from the room.

CHAPLIN, LEONARD HERBERT, Detective Constable, Harwich, Essex, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?
A. Leonard Herbert Chaplin.
Q. What is your business?

A. Detective constable.

Q. Where are you stationed?

A. Harwich, Essex, about 18 miles from here.

Q. Calling your attention to what has been marked Prosecution's Exhibit 1 did you at any time see Prosecution's Exhibit 1?

A. Yes.

Q. Where.

A. I took possession of that at Mistley police Station from Constable Felton.

Q. I hand you what has been marked Prosecution's Exhibit 2. Did you see Prosecution's Exhibit 2 at any time?

A. Yes. It was the same time and place I took possession of that.

Q. What did you proceed to do with Prosecution's Exhibits 1 and 2?

A. I conveyed them to the Harwich Police Station where they were locked in the C.I.D. office. On the 17th of July I forwarded those two articles by registered post to Dr. Davidson, of the Metropolitan Police Laboratory, Hendley.

Q. Were these articles of clothing given to anyone else other than yourself from the time you first took possession of them?

A. Not at all.

The witness was then excused and withdrew from the room.

232 WAKELY, HARRISON J., Pfc. 1260th MP Company, AAF Station F-157, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. Pfc. Harrison J. Wakely, 1260th MP Company Station F-157.

Q. Do you know the accused in this case?

A. By sight, sir.

Q. Can you identify him here in the court room?

The witness identified the accused.

Q. Is he in the military service of the United States to your knowledge?

A. Yes, sir.

Q. Calling your attention to the evening of July 11th, 1944, at about 1800 hours, where were you at that time?

A. Going on duty, sir.

Q. Where were you on duty?

A. Post 2.
Q. Post 2 where?
A. Down by the church.
Q. That is on this station?
A. Yes, sir.
Q. What was your tour of duty on 11 July 1944?
A. From 1800 to 2400.
Q. Was there anyone else there on the gate as sentry? Other than yourself?
A. No, sir.
Q. You were posted there as sentry?
A. Yes, sir.
Q. What are your duties as a sentry?
A. To check the passes of boys going out and coming in.
Q. When you check the passes of the boys coming back in, what do you check them for?
A. Just check the passes; that's all.
223 Q. That evening do you remember seeing the accused?
A. Yes, sir.
Q. About what time was it you saw the accused?
A. About 11:45.
Q. How do you fix that time?
A. It was just before the relief came around.
Q. You are relieved when?
A. We are supposed to be relieved at 12 o'clock.
Q. How do you know it was the accused you saw about 11:45?
A. He came in with one of our boys.
Q. Do you remember who that was?
A. Partyka.
Q. How soon after that did you go off duty approximately?
A. About 20 minutes.

Cross Examinaton.

Questions by Defense.

Private Wakley, do you remember having a conversation with me last evening?
A. Yes, sir.
Q. Who was present?
A. Smith and Lt. Crollard were present.
Q. Was Lt. Lieberman present?
A. Yes, sir.
Q. Do you remember talking to us about what time the defendant came on to the base on July 11th?
A. Yes, sir.

Q. Do you remember your telling us you were relieved at 11:50, or 10 minutes to 12 and fully 20 minutes before you were relieved, this boy came in?

A. Yes, sir. It was between 11:30 and 11:45.

Q. You told us it was nearer 11:30. Since then has your recollection been refreshed?

A. No, sir.

Q. Have you had an opportunity to speak with the Trial Judge Advocate at any time?

234 A. No, sir.

PROSECUTION. I think for the purpose of the record I might say I saw him yesterday.

DEFENSE. Didn't you tell us it might have been between 11:15 and 11:30 this boy came in?

A. No, sir. I said between 11:30 and 11:45.

Q. Didn't we say Partyka said he came in between 11:15 and 11:30 and didn't you say then that he may be right?

A. No, sir.

Q. Did you have a watch with you when you were on duty the night of July 11th?

A. Yes, but I didn't look at it.

Q. You do know you were relieved about 10 minutes to 12?

A. Yes, sir.

Q. Are you sure how many minutes it was before you were relieved that these boys came in?

A. I couldn't say for sure.

Q. It may have been 20 minutes or a half hour?

A. I think it is nearer 20 minutes than a half hour.

Q. But it may have been a half hour?

A. Yes, sir.

Examination by the COURT.

LAW MEMBER. How do you fix 11:50 as the time you were relieved on July 11th?

A. The relief was early that night.

Q. Did you look at your watch?

A. Yes, it was about 10 minutes of.

Q. Did you leave the post right then and go to your quarters?

A. Yes, sir.

Q. You don't put down a time when a man comes in on this post?

A. No, sir.

Q. You don't put down a time when he goes off?

A. No, sir.

235 Q. You just look at his pass to see whether he is reporting back at the time fixed on his pass?

A. Yes, sir.

Member of Court: At that particular post, isn't there a clock that rings chimes at 15 minute intervals?

A. No, sir. It only rings on the hour.

Q. Did you hear the clock at 12?

A. No, sir.

Q. Did you hear it at 11 o'clock?

A. Yes, sir.

Law Member. How far is the post at which you were stationed from these two bridges referred to in the trial?

Defense. Sir, we are going down there later this afternoon to take the reading of the speedometer, etc.

The witness was then excused and withdrew from the room.

Prosecution. At this time I desire to read for the benefit of the court an excerpt from Military Justice Circular No. 3, Branch Office of The Judge Advocate General, dated 11 March 1944, as to Paragraph 4 thereof:

View of the Premises.

Following is an extract from B R Opinion (ETO 611: Porter)

"The practice of 'viewing the premises' by a military court is authorized procedure (AW 31). However, the practice of receiving testimony and examining witnesses at a 'view of the premises' is almost universally condemned and usually is reversable error. (Underhill's Criminal Evidence, p. 833, sec. 410, note 49; 16 CJ, p. 827, sec. 2092, note 9; 23 CJS, p. 234, sec. 986, note 52). A 'view of the premises' properly conducted and not coupled with examination of witnesses may in many instances be extremely helpful and informatory to the courts. When in addition, the court either permits or directs an examination of a witness at the scene of the event it is indulging in a highly dangerous practice, which is not approved or commended."

At this time, before the Prosecution rests, I ask that the court be transported to the scene where the alleged offenses are said to have been committed, so they will have an opportunity to observe the scene.

Defense. The Defense joins in that plea.

MCN The court then at 5:05 P. M. ~~recessed until 7:30 P. M. during which time~~ the personnel of the court, the prosecution and the defense, the accused and the reporter went to MCN the scene of the alleged crime *after which the court recessed until 7:30 P. M.*

At 7:30 P. M., the personnel of the court, the prosecution and the defense, the accused and the reporter resumed their seats in the court room.

236 PROSECUTION. The Prosecution rests.

DEFENSE. The Defense does not desire to make any motion at this time and calls as its first witness Bernard W. Smith, the accused.

LAW MEMBER. Private Smith, you have the right to do one or more of several things. First, you may remain silent and say nothing at all and the court will not presume you are in any way guilty merely because you remained silent. Second, you may make an unsworn statement, either written or oral, or by your counsel, about any or all of the matters touched on in this trial. Third, you may take the stand like any other witness and testify in your own behalf. In case you do take the stand, the Trial Judge Advocate may cross examine you not only in matters covered in direct examination but on collateral matters, to test and impeach your credibility. The cross examination by the Trial Judge Advocate may cover any fact relative to the issue of your guilt or innocence or relative to your credibility as a witness. You cannot avail yourself of your privilege against self-incrimination to escape proper cross-examination and if you have any prior military or civil convictions you may be questioned regarding those convictions to test your credibility. Do you thoroughly understand the explanation I have just given you?

ACCUSED. I do, sir.

DEFENSE. When you make reference to prior civil and military convictions, with reference to the military, it is my understanding the Prosecution is limited to crimes which occurred one year immediately previous to the crime alleged here. Secondly, with reference to civilian convictions, you are limited to those crimes which go to his credibility?

PROSECUTION. That is right.

LAW MEMBER. Private Smith, it is your desire to be sworn and take the stand in your own behalf?

ACCUSED. Yes.

SMITH, BERNARD W., Private, Hq Det, 353rd Fighter Group, the accused, was then sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name, grade, organization and station?

A. Private Bernard W. Smith, 353rd Fighter Group, AAF Station F-157.

Q. Are you the accused in this case?
A. Yes, sir.

Questions by DEFENSE.

Q. Private Smith, I direct your attention to the night of July 11, 1944. Where were you at about 7 or 7:30 that evening?

227 A. At 7 o'clock that evening sir, I was in the 351st Mess Hall.

Q. And after you ate what did you do?
A. I was on duty that night. I went off duty at 7 o'clock.
Q. What did you do then?
A. I left the Mess Hall, cleaned up and went out about 7:30.
Q. Where did you go to?
A. I went out of Post 2 to East Bergholt.
Q. What time did you reach East Bergholt?
A. Close to 8 o'clock.
Q. When you arrived at East Bergholt what did you do?
A. I was looking for a drink and rode around to a couple of different pubs.
Q. How long did you ride around?
A. I would say I was in East Bergholt from 45 minutes to an hour.
Q. What did you do then?
A. I couldn't find any light beer over there so I went down to Brantham.
Q. How far is E. Bergholt from Brantham?
A. About 1¼ miles from the Red Lion.
Q. Where were you going to in Brantham?
A. To the Bucks Horns Inn.
Q. What time did you arrive at the Bucks Horns Inn?
A. Close to 9 o'clock.
Q. What did you do then?
A. I went in there and had a drink.
Q. How much did you drink?
A. One glass of beer. The place was pretty crowded and they ran out of bottled beer and I went up to one or two other pubs.
Q. Where did you go then?
A. A pub called "The Ark."
Q. When was that?
A. In the neighborhood of 8 o'clock.
Q. What time did you leave The Ark?
A. 10 minutes after 9 or 9:15.

Q. How long did you stay at the Ark?

A. I believe I had two drinks at the Ark. I was in there anywhere from 15 to 20 minutes.

Q. Up until that point you had had 3 drinks?

A. Yes, sir.

Q. In each instance what did you drink?

A. Beer.

Q. About what time was it when you left the Ark?

A. Around 9:20 or 9:30.

Q. Where did you go?

A. There is a place in Brantham called the Club. I went to see if I could get a drink of liquor. I went there and all they had was beer. I had a drink of beer in there.

Q. How long did you stay there?

A. I was there about 15 or 20 minutes—long enough to drink a pint.

Q. Where did you go then?

A. Back to the Ark.

Q. What time did you reach the Ark?

A. It was about a quarter to 10.

Q. How long did you stay there?

A. Until closing time, which is 10:30 in that pub. They called time at 10:30 and it was about 10:40 before I left. I came back to the base then.

Q. From that point, how far distant is it back to this base?

A. I would say in the neighborhood of five miles.

Q. How far is it from the scene of the alleged crime you saw today to the Ark?

A. ¾ of a mile to a mile.

DEFENSE. At this time Defense calls upon the Prosecution to stipulate that from the scene of the alleged crime to this base A-157, it is approximately 5 miles.

PROSECUTION. It is five miles; not approximately.

DEFENSE. It is five miles.

LAW MEMBER. Private Smith, is it your desire to stipulate to the effect that it is five miles from Gate 2 to the scene of the alleged crime. That is the second alleged crime, in which the Dale girl was involved?

239 ACCUSED. Yes, sir.

DEFENSE. That means there were how many miles from the Ark to the base here?

ACCUSED. Between 4½ and 5 miles.

DEFENSE. You started back?

A. Yes, sir.

Q. What happened?

A. I left the Ark and went down to the corner and [illegible] toward E. Bergholt. I got up the first real steep hill on the way to Bergholt about half way between Brantham and East Bergholt.

Q. About how far out of Brantham?

A. ½ mile. I got off my cycle to walk. In about 30 seconds to a minute another soldier came up behind me.

Q. Did you recognize that soldier?

A. Yes, sir. I recognized him as a member of the Military Police but not by name.

Q. About what time was it you think he overtook you?

A. Around a quarter to 11 and 10 minutes of 11.

Q. You were then how far from this base?

A. About 4 miles. I wouldn't want to make that definite.

DEFENSE. I ask the court at this time to take judicial notice of the fact that the terrain from this base to the scene of the alleged crime is an extremely hilly one. We traveled it ourselves this afternoon in automobiles. It is just one series of hills.

LAW MEMBER. Having been given an opportunity to visit the scene of the crime, the court will take judicial notice of the terrain between here and the scene of the crime.

Partyka

J J McN P C DEFENSE. You started back with ~~Sgt. Pelletier~~ at 10 to 11?

Leading.

J J McN P C PROSECUTION. Objection. ~~No evidence.~~

DEFENSE. I withdraw that. Did you subsequently determine who that M. P. was?

A. I didn't know him by name that evening.

Q. Did you find out after that evening what his name was?

A. Yes, sir.

Q. What is his name?

A. I found out that evening what his name was, when we came thru 2 Gate. The M. P. called his name.

240 Q. What was his name?

Partyka

J J McN P C A. ~~Sgt. Pelletier.~~

Partyka

J J McN P C Q. When you and ~~Pelletier~~ started back at 10 minutes to 11, 4 miles distant from this base, did you ride your bike the entire 4 miles?

A. When he overtook me, I was riding. We got off and continued walking up the hill together. We got to the top of the hill. We went to the corner where you turn right at East Bergholt to come toward the base and I suggested

a smoke. It was warm that evening. We had a smoke for about 5 minutes.

Q. After you stopped for 5 minutes what did you do?

A. We proceeded back to the base.

Q. Did you ride quickly or slowly?

A. Just rode along slowly. We were conversing about some of his dates he had down that way and I was telling him about a young lady I went with in Ipswich.

Q. What was his condition when you met him?

A. He had maybe a couple of drinks. He was not drunk.

Q. What time did you reach Gate #2?

A. I would say between 11:15 and 11:30.

H J McN
D P G

Partyka

Q. Was ~~Pelletier~~ with you at that time?

A. Yes, sir.

Q. Where did you go after you reached the gate?

H J McN
D P G

Partyka

A. At the gate I asked ~~Pelletier~~ if he would like to go up to the Mess Hall and get a sandwich and a cup of coffee. He said he would. We went there then.

A. About what time was it you got to #351 Mess Hall?

A. Between 11:15 and 11:30.

Q. You are sure it wasn't later than 11:30?

A. I am positive.

Q. When you arrived at the Mess Hall who was there in that mess hall?

A. There was S Sgt. Page in the dining hall and there was another sergeant sitting with him. I didn't know his name at that time.

Q. Did you subsequently determine what his name was?

A. I can't recall it.

Q. Who else was there?

241 A. I went back in the kitchen to get a cup. I always kept my equipment there.

Q. You worked at that Mess Hall?

Partyka

A. Yes. I got a cup and ~~Pelletier~~ came out and I got him a cup of coffee and told him to help himself to food on the counter. He made a sandwich and we stood there talking.

Q. Who else was there?

A. LaPage and this other sergeant. A fellow named Prettyman was on duty making meatloaf for the following day. In the back room was Sgt. Pelletier, Sgt. Callendar, 1st Sgt. Hayes of the 351st.

Q. Did you have occasion to see and speak with them?

H J McN
D P G

A. I spoke to all of them.

Q. How long did you stay there?

A. I was in the Mess Hall that evening until after 12 o'clock. It was quite some time after 12 that I returned to my barracks.

Q. Private Smith, you have been seated here during the entire case.

A. Yes, sir.

Q. You heard all the testimony of the complaining witnesses. Did you ever see the girl known as Miriam Cullum before?

A. No, sir; I have never seen that girl before, except at the identification parade that day.

Q. Tell us the circumstances you saw her under at the identification parade.

A. I was asked by Lt. Todd if I would be in an identification parade. I said I would. They informed me what I was under suspicion for and what the parade was for and there would be two girls to look me over. That there would be 15 men and I could pick out my place in the line and these girls would try to identify me.

Q. Did you have occasion to see Miriam Cullum at the identification parade and describe the circumstances thereunder.

A. The first time I seen Miriam Cullum, I was standing approximately in the center of these 15 men in the identification parade. She was brought out of the guardhouse.

Q. Were you standing alone at the time?

A. No, sir; I was standing among these 15 men and at that time there was one of these C. I. D. men, an American civilian, standing in front of me a little off to my left, talking to me.

Q. Did he have his hand on any of your person at the time?

A. His hand was on my shoulder.

242 Q. I understand you clearly then, you never saw Miriam Florence Cullum before July 18th, which is the time of the identification parade, is that correct?

A. Yes, sir.

Q. You certainly did not see her on the night of July 11th?

A. I certainly did not.

Q. Tell this court the circumstances under which you had occasion to see the other complaining witness, Winnie Dale?

A. She was brought out of the guardhouse in the same manner as the other one and I seen her when she got out in front of myself and the other 15 men.

Q. Had you ever seen her before the identification parade and had she seen you?

A. Yes, sir; she had.

Q. Had you ever spoken to her before?

A. No, sir.

Q. Did she know you to say hello to you?

A. She might have known somebody I had been with several times.

PROSECUTION. Object. Ask that it go out.

DEFENSE. I consent to that. Answer that question directly. Did she know you to say hello to?

A. I couldn't answer that truthfully, sir. I don't know whether or not she would.

Q. Where had you had occasion to see her before?

A. I have seen her on the road several different times. I have seen her in pubs in East Bergholt.

Q. Did you see her on the night of July 11, 1944?

A. No, sir; I did not.

Q. Do I understand you to say you did not see her on the night of this alleged crime at all?

A. That is true, sir.

Q. Pvt. Smith, there has been certain testimony with reference to a wound on your left hand. Would you be good enough to tell this court the circumstances under which you got that wound?

A. Yes, sir. I was working in the 351st Mess Hall. It was in the afternoon and it was on the following Thursday—the Thursday that followed the Tuesday of this alleged crime. I was opening cans of milk and I had my hand on a can of milk to open it with a cleaver and
243 I happened to get too close to that hand and took a good nick out of it. At that time it was bleeding pretty much and I had one of the men on duty—I asked him if he had a band aid and he said he did have one in the back room.

Q. Who was that man?

A. Sgt. Pelletier, my shift leader.

Cross-Examination.

Questions by PROSECUTION.

Q. How many drinks had you had on the night of July 11th?

A. I had about 4 or 5 drinks.

Q. How many drinks of liquor?

A. I had no liquor on that night, sir.

Q. Did you ever tell Lt. Todd it was Sgt. Callenday whom you asked for a band aid and whom you told you had cut your fingers?

A. No, sir, I don't believe I did.

Q. Have you been convicted of a military offense within one year of the date of this offense?

DEFENSE. Objected to. He is merely on a fishing expedition. If there are crimes, they go to the credibility of the witness.

PROSECUTION. I am asking about military convictions. I can ask him about previous military offenses.

LAW MEMBER. If it affects his credibility as a witness.

PROSECUTION. Let him answer the question.

DEFENSE. That is like locking the door after the horse is stolen.

PROSECUTION. I withdraw the question. What kind of cycle were you riding on the evening of 11 July?

WITNESS A G. I., R. A. F. bike.

Q. What color was it?

A. Khaki, and it had a black new fender.

Q. How many teeth do you have out?

A. One tooth.

Q. On which side of your mouth?

A. The left side of my mouth.

Q. How about your other teeth? Is there some space between them?

A. Not too much.

PROSECUTION. Will you open your mouth and show the court your teeth?

244 The accused opened his mouth, indicating his teeth were somewhat widely spaced.

PROSECUTION. One tooth is out here on the left front. Are there any more teeth out?

ACCUSED. One back here.

Q. That is all on the left side?

A. Yes.

Q. What time did you get the new can opener that is in the Mess Hall? What date?

A. I don't know what date that was.

Q. Wasn't it before the 13th of July?

A. It is possible.

Q. Before that time you had been using cleavers?

A. Yes, and we were using cleavers at that time.

Q. Weren't you instructed to use the new can openers?

A. Not to open milk, sir.

Q. How long would you say you stayed at the Mess Hall after you came back to the post?

A. Sometime after 12.

Q. Approximately, what time after 12?

A. It could have been anywhere from 12:15 to 12:30.

Q. Is there no clock in the Mess Hall?

A. Yes.

Q. Did you look at the clock?

A. I believe I looked at the clock when I went out.

Q. Are you sure you looked at the clock?

A. I believed I did.

Q. What did the clock read?

A. It was sometime between 12 and 12:30. I don't remember exactly.

Q. How far is it from the Mess Hall down to your Barracks Orderly Room?

DEFENSE. Object. He said: "barracks Orderly Room"

LAW MEMBER. That is the squadron Orderly Room?

A. Yes.

245 LAW MEMBER. Objection overruled.

ACCUSED. I would say it was a distance of from here to the flag pole.

PROSECUTION. How many feet?

A. I am not good at measuring feet. It is about a short city block.

Q. Did you go direct from the Mess Hall to your Orderly Room?

A. Yes, sir.

Q. Did you stop on the way?

A. Usually—

PROSECUTION. Not what you usually do, but what did you do this night?

A. I went thru my barracks, threw my hat and coat on the bed and went right on to the Orderly Room.

Q. You didn't stop anywhere on the way?

A. No, sir.

Q. How long did it take you to go from the Mess Hall to the Orderly Room and the route you took?

A. I would say a couple of minutes, that is all.

Q. Do you remember when you signed a statement for C. I. D. agent on July 18, 1944?

A. I do.

Q. Do you remember in that statement saying: "I had something to eat and then I went to the Orderly Room where I signed in. It was then about 1 A. M. but I signed

in the time as something before 0100 hours which you say you saw Spires.

A. Yes, sir.

Q. Now you say you left the Mess Hall somewhere between 12:15 and 12:30 and it took you from one to two minutes to get to the Orderly Room. That is what you say now?

A. Yes, sir.

Q. Which is the correct statement: the one you gave on the 18th of July that it was about 1 A. M. you signed in, or was it approximately 12:17 or 12:32 when you signed in?

A. When I made that statement, I was a little confused.

Q. Are you more certain of the time now?

A. Yes, sir.

Q. You are not more sure of the time than you were on the 18th of July?

A. It could have been any time between 12 and 1.

246 Q. In other words, you are not sure what time it was that evening?

A. After 12 o'clock I am not sure of the time.

Q. Your judgment of time after 12 o'clock was not as good as it was before 12 o'clock on this evening?

A. There was no reason to remember the time after 12 o'clock. I was outside, there was no clock or anything.

Q. Was there an occasion before 12 o'clock for you to remember the time?

A. Yes, sir.

Q. What was that occasion?

A. At that time the radio was on.

Q. Is that the only reason you remembered the time that particular evening?

A. And the fact certain peoples were in the Mess Hall that usually came in at a certain time.

Q. You noticed the people particularly before 12 o'clock but did not have occasion to note the time after 12 o'clock?

A. After I left the Mess Hall I didn't see anybody.

Q. When you were in Brantham, after 10:40, did you see any clocks after that time?

A. After I left the pub, I didn't see any clock.

Q. How long did it take you to cycle from the corner at East Bergholt up to the post?

A. I would say between 30 and 40 minutes, sir.

Q. What time was it you say you left East Bergholt?

A. What time do you mean?

Q. When you started to cycle back to the post?

A. I got to East Bergholt about 5 or 10 to 11.

Q. That is how far from the post here—Gate 2?

A. About anywhere from 3 to 3½ miles.

Q. You say it took you approximately 30 minutes to cycle that?

A. Yes, sir.

Q. So that would get you to the post about 11:35?

A. Between 11:15 and 11:30.

Q. On your own time, if you got to East Bergholt at about 5 minutes to 11, it would take you about 30 minutes or thereabouts to cycle?

247 A. About.

Q. You stopped 5 minutes on the way?

A. That is included in that, sir.

Q. How long did you stop at Gate 2?

A. We were there for I would say a couple of minutes.

Q. Were you sure about the time then?

A. Approximately.

Q. You are not sure whether it might have been 15 minutes either way?

A. I am practically sure it could not have been later, sir.

Q. Later than what?

A. Later than 11:15 or 11:30. It was in between there.

Q. When you were down at the pub, before you started home, did you see any girls there?

A. In the pub, sir.

Q. Outside the pubs?

A. No, sir, I didn't.

Q. Did you see the girl Miriam Cullum at that time?

A. No, sir.

Q. Did you see the girl Sheila Dale at that time?

A. No, sir.

Q. At any time that evening did you cycle toward Manning Tree to look for a pub to get a drink?

A. No, sir.

Q. When you came back to sign in, you didn't sign in the time you really arrived at the Orderly Room, did you?

A. No, sir; I didn't.

Q. You put down some other time than the time you got there?

A. We usually guessed the time. That has been the practice of all the fellows.

Q. Did you guess the time?

A. I just put down 2400, or 2300, I don't remember which it was. There were so many nights I was out.

Q. At the time of the line-up at the identification parade you consented to that, did you?

A. Yes, sir.

248. Q. The two girls, Miriam Cullum and Sheila Dale did not come out at the same time, did they?

A. No, sir.

Q. You chose your own place in line, did you not?

A. Yes, sir.

Q. No one placed you in any particular spot, did they?

A. I wasn't given time enough to change my position before the second girl was brought out.

Q. She was not present at that time, was she?

A. The C. I. D. man asked me if I wanted to change my position in the line but before he had completed talking to me the other girl was brought out and I never had an opportunity to change my position. If I had changed at that time, everyone could have seen me changing my position.

Q. The two girls weren't there at the same time, were they?

A. No, sir.

Q. How long was it after the girl Miriam Cullum disappeared from your view that Sheila Dale was brought out?

A. I would say it was only a matter of 30 seconds to a minute. One was taken in and the other brought right out.

Q. You didn't see them stop to talk at any time?

A. I was standing with my back to the door.

Q. You did have a cut on the meaty portion of your left thumb, did you not?

A. Yes, sir.

Q. But your hands were behind your back in the identification parade?

A. Yes, sir.

Q. The girls did not look at your hand, did they?

A. No, sir.

Q. After you were identified by the two girls at different times, did they then go down the line to look at the other men?

A. This one girl was practically forced to go down the line to look at the men.

Q. She did look at the men?

A. She had her head half covered up but was looking at them.

Q. What girl was that?

A. Miriam Cullum.

249. Q. Sheila Dale walked down the line, didn't she and looked at the other men?

A. Yes, she did.

Q. There was no hesitation with the girls in picking you out, was there?

A. Sheila Dale walked down the line and I didn't just remember how it was she picked me out. The other one stood off to the side and she had hysterics or something and one of the officers or C. I. D. men walked over to me and she put her hand on me.

Q. You weren't asked to show your teeth then, were you?

A. No, sir.

Q. There was nothing unfair in your mind about the identification parade?

DEFENSE. I object to that; it is relatively unimportant.

Law MEMBER. Objection sustained.

PROSECUTION. How many pubs were you in that night trying to get a drink?

A. I was in the Red Lion in East Bergholt. They didn't have anything in there—only mild beer.

Q. You went to the Bucks Horns?

A. I rode past another pub in East Bergholt and asked one of the boys what they had to drink but didn't go in.

Q. You went to the Bucks Horns?

A. Yes, sir.

Q. You went to the Ark, did you not?

A. Yes, sir.

Q. You went to the Club?

A. Yes, sir.

Q. How many other pubs did you go to?

A. That is all. The Ark, the Club, the Bucks Horns and the Red Lion are the only ones.

Q. Did you see anyone in any of these pubs you named?

A. Yes, sir.

Q. Did you see anyone in the Ark pub that you knew, at the time it was closing?

A. Yes, sir.

Q. Who was that?

A. A fellow named Swiatek of the 351st.

250 Q. Did you see anyone else?

A. Not in the Ark. He was with a young lady.

Q. Do you know whether he saw you?

A. He seen me because I spoke to him. I spoke to his lady friend, too.

Q. Isn't it true, Private Smith, you didn't get back to your base until approximately a quarter of 12?

DEFENSE. Object to that as already asked.

Law: Misstates. Overruled. It is legitimate cross examination.

Witness. I got back between 11:15 and 11:30, sir.

Prosecution. You only set that time by reason of the fact you left the Ark pub at about 10:40, as you say? Is that right?

A. Yes, sir.

Examination by the Court.

Member of Court. You first stopped at the Red Lion?

A. Yes, sir.

Q. Did you have beer there?

A. No, sir. They had nothing but mild beer.

Q. You went to the Bucks Horns?

A. I rode past the Hare and the Hounds and asked one of the fellows what they had. I next stopped at the Bucks Horns Inn.

Q. You next went to the Ark?

A. Yes, sir.

Q. Then the place called the Club? Then back to the Ark and you had a drink in the Ark each time?

A. I had two small glasses of beer in the Ark.

Q. You were in the Ark twice that evening for beer each time?

A. Yes, sir.

The accused was then excused and resumed his seat.

Partyka, Andy (NMI), Private, Detachment A, 1260th MP Company (Avn) AAF Station F-157, a witness for the Defense, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

251 Q. State your name, grade, organization and station.

A. Private Andy Partyka, 33677026, Detachment A, 1260 MP Co. (Avn) Station F-157.

Questions by Defense.

Q. Private Partyka, where were you on the night of July 11, 1944?

A. I was down at Manning Tree.

Q. What were you doing there?

A. Just loafing around and drinking.

Q. At the various pubs?

A. Yes, sir. I had been to quite a few pubs.

Q. At about 10 o'clock in the evening what pub were you at?

A. I was at the Bucks Horns.

Q. Until what time did you stay at the Bucks Horns?

A. Until 10 o'clock. I was drinking beer first of all I was with a few girls and I was drinking beer with them. We finished drinking beer and I went on my cycle with one of the girls to the first bridge. We stayed there about 15 to 20 minutes and then I went on home.

Q. You were at the first bridge coming from Brantham to Manning Tree with this girl until about what time? You left the pub at 10 o'clock, didn't you, or rather at 10 minutes after 10?

Law Member. Who is testifying?

Defense. He has already testified to that.

Law Member. I think we had better cut out the leading questions as much as we can.

Defense. What time did you actually leave the Bucks Horns?

A. It was a little after 10 because I took a little time finishing my beer.

Q. Where did you go then?

A. I cycled with this girl down to the first bridge.

Q. You stayed with her about 15 or 20 minutes and then left this girl?

A. Yes.

Q. What time was this?

A. About 25 after 10.

Q. Then what did you do?

A. Then I was on my way home and then met up with Smith.

252 Q. Where did you meet Smith?

A. On the way coming home.

Q. About how far was it from where you left the girl at the first bridge?

A. About ¾ of a mile.

Q. About what time did you meet Smith?

A. About a quarter to 11.

Q. What was he doing then?

A. He was cycling up the hill and I caught up with him. I rode in with him.

Q. Did you ride in directly?

A. We came up to East Bergholt and stopped.

Q. What did you do?

A. We had a smoke.

Q. How long did you stay there?

A. About 5 minutes.

Q. Then what did you do?

A. We came home.

Q. What gate did you come into?

A. Gate #2.

Q. What time did you reach that gate?

A. Near 11:30.

Q. How long did it take you to bicycle home from the point you met Smith? What time did you meet Smith?

A. About 25 minutes after 10?

DEFENSE. By virtue of the caliber of the witness, I think I should be permitted to lead him somewhat.

LAW MEMBER. Help him out a little bit.

DEFENSE. You say you left the girl at 25 minutes after 10 and traveled ¾ of a mile to meet Smith.

WITNESS. It took me about 10 minutes before I met Smith after I left the girl.

Q. What time do you figure that?

A. About a quarter to 11.

253 Q. Did you ever know Smith before?

A. No, sir.

Q. Ever seen him before?

A. No, sir.

Q. Did he ever talk to you and ask you to testify?

A. No, sir.

Q. You realize full well what the penalties are for telling anything but the truth to this court?

PROSECUTION. I object to the line of questioning.

LAW MEMBER. Overruled.

PROSECUTION. By reason of these questions he is giving greater weight to the testimony, ~~thus is accepted by the court~~. There might be some members of the court who would be influenced by this type of questioning. Therefore, I think it is objectionable.

LAW MEMBER. Overruled. It is the court's problem to judge the weight of the testimony.

DEFENSE. You know the penalty for not telling the truth to this court?

WITNESS. Yes, sir.

Q. You know the testimony given here is the truth?

A. It is the truth.

Cross Examination.

Questions by PROSECUTION.

Q. Private Partyka, you were pretty tight this night?

A. I was feeling high, yes.

Q. You don't know how long you stayed with the girl down there, not really?

A. I figured it was about 20 minutes.

Q. It may have been longer than that, couldn't it?

A. It could have been.

Q. You are not sure what time it was?

A. I used my own judgment that it would be 20 minutes.

Q. But you are not sure what time it was?

A. No.

Q. The same thing when you came on the post, you are not sure what time it was; you were still feeling pretty good?

254 A. Yes, sir. All the time I didn't know what time it was.

Q. You were just taking what you thought the time was. It may have been close to midnight when you came on the post?

A. Yes, sir.

Re-direct Examination.

Questions by Defense.

Q. You were able to ride the bicycle back from town?

Prosecution. Object.

Law Member. Overruled.

Witness. Yes, sir; I was.

Q. You weren't too drunk you couldn't

Prosecution. Objection.

Law Member. You are leading the witness. Sustained.

Defense. You know the caliber of the witness.

Defense. (To witness) When you got to Gate 2 on the evening of July 11th, who was on duty?

A. Sir; I don't know, but Wakley was on duty.

Prosecution. I object. The witness said he didn't know, but he found out later.

Witness. I didn't know exactly, but I found out later.

Prosecution. I ask that go out.

Law Member. Overruled.

Prosecution. He didn't know who was on the gate, but taking somebody else's word.

Law Member. How did you find out.

Witness. Thru some of the boys.

Law Member. Someone told you?

Witness. Yes.

Law Member. That is incompetent and will be disregarded by the court.

Defense. What time do you figure you came thru the gate finally?

PROSECUTION. I object. He is trying to rehabilitate the witness.

DEFENSE. The question doesn't need rehabilitation.

255 PROSECUTION. The question was "What time did you come thru the gate finally?" He is trying to rehabilitate the witness after I have taken him on cross examination.

Law MEMBER. If you want to ask your question, I am not going to limit you, but the matter has been pretty thoroughly gone into.

DEFENSE. I will withdraw the question.

DEFENSE. (to witness) Did you have lights on your bicycle?

A. I had a light, but did not have the light on.

Q. Why didn't you have it on?

PROSECUTION. Objection. It is not relevant or material to the issues.

DEFENSE. Certainly that is going to fix the time for us.

Law MEMBER. That wouldn't fix the time. Ask him a direct question—whether it was light or dark.

DEFENSE. At the time you came into the gate finally, was it light outside or was it dusk or was it dark?

WITNESS. It was dusk.

Q. By "dusk" what do you mean?

A. Getting dark. It wasn't dark yet.

Law MEMBER. Wait a minute.

DEFENSE. He is testifying. I am not putting words in his mouth.

Law MEMBER. Go ahead.

DEFENSE. You say it was dusk at that time?

A. Yes, sir.

Q. You had lights on your bicycle but did not have them on?

A. Yes, sir.

Q. Do you know what time the black out was that night?

PROSECUTION. I object to that question.

Law MEMBER. Objection overruled.

WITNESS. No, sir.

DEFENSE. Do you know what time it was necessary for you to put your lights on your bicycle?

PROSECUTION. Objection.

Law MEMBER. Sustained.

256 Examination by the Court.

President of Court. How do you know it was 10 o'clock when you got your last beer in the pub?

A. Sir, how I know it was 10 o'clock, I got my beer and the woman yelled out "Time, please." I got my beer and left.

Q. What pub was that?

A. The Bucks Horn.

Q. The woman called "Time" and you had your last beer?

A. Yes, sir.

Q. Then you went outside with this girl?

A. Yes, sir. I went down to the first bridge toward Manning Tree.

Q. What did you talk about when coming back with Smith?

A. When I first met him I said: "I'll ride in with you."

Q. Were you talking with him all the way back to Camp? Did you know Smith before you met him on the road that evening?

A. No, sir; I never met up with him. That was the first time.

Law Member. Did you know Private Wakley?

A. Yes, sir.

Q. How long have you known him?

A. Ever since I have been put in the M.P. Co.

Q. How long was that?

A. About 11 or 12 months.

Q. You don't recall seeing Pvt. Wakley at the gate that night. Had you had so much to drink you couldn't see him?

A. I was feeling high, but it wasn't that. I wasn't paying much attention.

Q. Did you stop to show your pass?

A. I believe so. I pulled my pass out of my pocket.

Q. Where do you check in when you come in at night?

A. I had a pass but I didn't sign out.

Q. When you are signed out where do you sign yourself back in?

A. In the MP Orderly Room.

Q. Is that a different orderly room from the Fighter Squadron?

A. Yes, sir, a different one.

Q. Have you ever been in the Ark—a pub known as "The Ark"?

A. Yes, sir.

Q. That night?

A. No.

Q. Any time?

A. Yes, sir.

Q. What town is The Ark in? Where is it? Is it at Manning Tree or Brantham or where? What town is it in?

A. I don't know a pub by the name of Ark.

Q. Is the Bucks Horn in Brantham?

A. Yes, sir. It is the first pub as you come into Brantham on your left.

Q. Do different pubs in Brantham have different closing hours?

A. I don't know.

Q. Do they all close at the same time?

A. I don't know, sir.

Q. Do you know anything about this pub called the Ark?

A. No, sir.

President of the Court. You have been in a lot of pubs?

A. Yes, sir.

Q. Do they all close at the same time?

A. Sir; I don't know. From what I hear some of the pubs close during the summer at 10:30.

Q. Have you been in other pubs at closing time?

A. These other pubs close at 10 o'clock. That night I didn't know what time it was.

Q. You just know they called "Time."

A. That is all.

Q. You didn't look at a clock at all?

A. No, sir; I didn't.

Prosecution. I take it then, Pvt. Partyka, from your testimony you don't know whether it was 10 or 10:30 that the pub closed?

A. Yes, sir; I don't know if it was 10 or 10:30.

258 Defense. He doesn't understand your question.

Prosecution. You don't know whether it was 10 or 10:30 at the time they closed the pub you were in?

A. No.

Q. On the way back did you have any conversation with Pvt. Smith about girls?

A. He was telling me he had a girl out but didn't mention any names.

Q. Did he tell you where he had the girl out?

A. No, sir.

Q. Did he tell you where he had had the girl that night?

A. No, sir. He didn't tell me at all.

Q. Do you remember the conversation I had with you in the office with Lt. Todd yesterday?

A. Yes, sir.

Q. Didn't you tell me at that time Pvt. Smith told you he had a girl in Manning Tree that night?

town

A. No, I didn't say what time. He told me he had a girl that night. That is as much as I remember now.

Law Member.

Q. What did he mean when he said he had a girl?

A. He didn't mention any town.

Law Member.

Q. Did he mean he had been out with a girl, or had intercourse with a girl?

A. Just he had been out with a girl.

Law Member.

Q. He didn't say where?

A. No.

Law Member.

Q. Nor the time?

A. No.

Law Member.

Q. Was anything said between you and Smith when you were on your way back to the post about what time it was?

A. No, sir.

Law Member.

Q. The time was not mentioned one way or another?

A. No, sir.

President of Court. Your didn't sign into the Orderly Room when you returned?

A. No, sir.

The witness was then excused and withdrew from the room.

259 Pelletier, Joseph C., Sergeant, 351st Fighter Squadron, AAF Station F-157, a witness for the defense, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

Q. State your name, grade, organization and station.

A. Sgt. Joseph C. Pelletier, 351st Fighter Squadron, Station F-157.

Questions by Defense.

Q. I direct your attention to the night of July 11th. Did you have occasion to see Pvt. Smith that evening?

A. Yes, sir.

Q. What time was that?

A. Between 11 and 12 o'clock.

Q. How do you fix that time?

A. It was shortly after the A.F.N. news bulletin.

Q. What time did the A.F.N. news bulletin end?

A. I couldn't say correctly. It was some time between 11 and 11:15.

Q. You are sure you were listening to the A.F.N. news?

A. Yes, sir.

DEFENSE. I ask the court to take judicial notice that the A.F.N. news goes off the air at 5 minutes after 11 every night.

LAW MEMBER. The court cannot take judicial notice of that. It has to be proven.

DEFENSE. Will you stipulate to that, Captain McNeal?

PROSECUTION. No, I will not.

DEFENSE. How long after the A.F.N. went off the air did the defendant come into your room?

A. A few minutes.

Q. 10 minutes?

A. Probably less.

Q. 10 minutes or less after the A.F.N. went off the air?

A. Yes, sir.

Q. That was the 11 o'clock news broadcast?

A. Yes, sir.

Q. Did you have occasion to listen to the radio?

260 A. No, after that was over we changed the station to B.B.C.

Q. Did you listen to the 12 o'clock news?

A. Yes.

Q. You are sure this wasn't the 12 o'clock news but the 11 o'clock news?

A. Positive.

Q. And that it was 10 minutes after the A.F.N. went off that Smith came in?

A. That is right, sir.

Q. A day or two after July 11, 1944 did you have occasion to see Smith's hand and a bruise thereon?

A. Yes, sir.

Q. Will you tell the court the circumstances under which you saw it?

A. I believe it was on a Thursday in the morning, approximately 9 or 9:30. I was in the room in back of the mess hall, where we sleep and keep the medical aid kit. Smith came in with a cut on his hand.

Q. Which hand.

A. I don't know. I don't recall whether it was the right or left.

Q. How did he cut that, did he say?
A. While he was opening cans.
Law Member. Did you see him cut it?
A. No, I didn't, but I know what he was doing at the time.
Prosecution. I ask that his testimony about how he cut it go out.
Law Member. Unless you saw him cut it, or know in some manner other than him telling you, it wouldn't be competent.
Witness. It was cut by a cleaver.
Prosecution. Objection—ask that that go out.
Q. Did you see it cut?
A. I didn't see it.
Q. Did you see the blood running?
A. Yes.
Q. Did he tell you how he cut it?
Prosecution. Objection.
A. He said he cut it.
Defense. If the blood was running at that time and that was the *res gestae* at that time, it would come within the rule. He testified the blood was flowing.
261 Law Member. He may testify the blood was flowing but what Smith told him as to the manner he cut it is incompetent.
Defense. Did you have occasion to see Smith at that time?
A. Yes, sir.
Q. Did he have any other marks or cuts at that time?
A. Not that I noticed.
Q. You knew Smith before this trial?
A. Yes, sir.
Q. What is your relationship to him?
A. I was his chief cook here at this base.
Q. Have you ever talked to him concerning this case?
A. No, sir.
Q. Did he ever threaten you or ask you to testify for him?
A. No, sir.
Q. All the testimony you have given to this court has been the truth?
A. Yes, sir.

Cross Examination.

Questions by Prosecution.
Q. Sergeant, what time did you go to bed on the evening of 11 July?

A. About 10:15.

Q. Did you go to sleep?

A. No, sir; I was lying in bed reading.

Q. You said Smith came in some time between 11 and 12 o'clock that night?

A. That is right.

Q. You are not sure when he came in?

A. He came in shortly after 11, he spoke to me, went out of the room and came back again.

Q. You didn't have any watch, did you?

A. No, sir.

Q. You didn't look at any watch?

A. No, sir.

Q. Or clock?

A. No.

262 Q. It is just your judgment what time it was?

A. I recall the A.F.N. news and about 15 minutes later the B.B.C. came on.

Q. It was just your judgment by the one news broadcast when it came on and Smith came in. You may have been wrong about your judgment?

A. It was in between the hour of 11 and 12.

Q. Isn't it true you told Lt. Todd that Private Smith had a cut on his index finger or another finger and that he did not have a cut on his thumb?

A. The finger for the thumb—I wasn't quite sure.

Q. You don't know whether it was the right or left hand?

A. The right, sir.

Q. You don't know that prior to his coming in to show you the cut he had had a cut there before?

A. No.

Examination by the Court.

President of Court: You were in your room when Smith first came into the room?

A. Yes, sir.

Q. Why did he come in your room? What did he do in your room?

A. As a rule each night when any cooks went out they usually come back thru the Mess Hall and have a cup of coffee before going to bed. He came into the room and spoke to me about what we were supposed to have the following night.

Q. What did he do when he came into your room the second time? Did he say anything to you or did you say anything to him?

A. When he came in I believe he came in to take his blouse off the hook. As a rule when they come in they put their blouses on the hook.

Q. When was that?

A. 12 o'clock.

Q. Approximately 15 minutes later after he left the second time you heard the B.B.C. news?

A. Yes.

Q. What time did they announce?

A. 12 o'clock, sir.

Law Member. When you go out on pass are you required to sign in when you come in? Where do you sign in?

A. In the Orderly Room, sir.

263 Q. Is it in a book?

A. Yes, sir; they have a sign out and sign in sheet.

Q. Do you sign on a single sheet or in a book where a lot of others sign?

A. Where a lot of others sign in, sir.

Q. How many men do you have a night on pass in the 351st Fighter Squadron?

Defense. May I point out that the error is mine. The defendant is a member of Headquarters 353rd Group. This boy is a member of the 351st Fighter. They mess together.

Law Member. Would you sign in the same place that Smith would sign in?

A. No, sir.

Q. You sign in at the 351st Fighter Squadron?

A. Yes.

Q. He signs in at the 353rd Headquarters?

A. Yes, sir.

Q. What part of his hand was this cut on that you saw?

A. Sir, I remember dressing the cut for him. I am not sure if it was the left or not.

Q. Put your left hand out. What part of that hand would that cut be on?

A. Somewhere around here—if it was cut by opening cans.

Q. I am speaking about the cut you saw—what part of his hand was it on?

A. It would be somewhere around here. (Indicating the back of the left thumb.)

Law Member. Where would you say in opening cans you would normally cut your hand?

Prosecution. Objection—not competent.

A. At the time we were opening cans with cleavers.

Q. What do you hold the can with?

A. The left hand.

Q. If you are right handed, you hold it with the left hand and swing the cleaver with the right?

A. Yes.

Q. Where did you say the cut you saw was?

A. I would say it was somewhere around the thumb and finger. I couldn't say just where it was. We see so many cuts.

Q. If a man was holding a can in his left hand and using a cleaver with his right, how could the cut be on the inside of his hand. I withdraw the question if there is any objection.

264 DEFENSE. No, sir.

LAW MEMBER. If you open a can with a cleaver, you don't know how the can is going to open or how the tin is going to come out.

A. By pushing the can away you are likely to cut yourself most anywhere.

PROSECUTION. I ask that that portion of the testimony go out as being purely speculative.

DEFENSE. He could have objected at the time the question was asked.

LAW MEMBER. Objection is overruled.

LAW MEMBER. (to witness) Do you know at what time—what was the final time you had to be in on this post on the 11th of July?

A. 12 midnight.

President of COURT. Did Pvt. Smith get a cup or a canteen from your room the first time he came in? Any container out of your room?

A. I believe he did, because as a rule they are always on our shelves.

Q. Do you know if he got one that night?

A. I couldn't state definitely.

Q. PROSECUTION. Do you sleep in the same barracks with the accused, Private Smith?

A. No, sir.

DEFENSE. Isn't it a fact your sleeping quarters are right in back of the Mess Hall? Inasmuch as you are a cook you sleep in the Mess Hall—in the back—and when the cooks come in they frequently come in to the back of your quarters?

A. Yes, sir.

HAYES, ROBERT A., 1st Sgt., 351st Fighter Squadron, AAF Station F-157, a witness for the Defense, was sworn, and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. Robert A. Hayes, 1st sergeant, 351st Fighter Squadron, Station F-157.

Questions by DEFENSE.

Q. Did you have occasion to see the defendant in this case on July 11th?

A. I did, sir.

Q. Tell the court the time and the circumstances.

265 A. It was approximately 11:30 or 11:45 I saw him in the kitchen of the Mess Hall in the 351st Fighter area.

Q. How do you figure that time?

A. I went back to the time I left a pub in Dedham. I left between 10:30 and 10:45. It is about a 30 minute ride from the pub. I was in the area 10 minutes and in the Mess Hall 10 minutes before I saw Smith.

Q. Therefore you figured the time to be 11:30?

A. That is right.

Q. Did you have occasion to go to your barracks and turn on the radio the night of 11 July?

A. No, sir.

Q. Do you know Smith?

A. I do, sir.

Q. Have you known him before this action?

A. I have known him about 4 months.

Q. Has he ever asked you since this action was commenced to come into this court and tell this story for him?

A. No, sir.

Q. Did he ever threaten you physically or otherwise?

A. No, sir.

Cross-Examination.

Questions by PROSECUTION.

Q. Sergeant, you are not sure whether this was the night of July 11th or not?

A. I am certain, sir.

Q. Do you remember telling Lt. Todd you didn't know whether it was the night of Tuesday the 11th of July, but it was one night last week?

A. That was the first time Lt. Todd questioned me but

then, when I thought back and checked up, I was able to recall it was the night I had been to Dedham.

Q. But the first time you talked to Lt. Todd you were not sure?

A. Not at that time.

Q. When you saw the accused, he came in from outside?

A. I am not certain.

Q. Do you remember telling Lt. Todd when you were in the kitchen the accused came in from outside with another soldier?

A. I meant outside the kitchen. I did not understand what you said. The Mess Hall is divided into sections.

266 Q. When you did turn around, you saw the accused with another soldier?

A. Yes, sir.

Q. You had not seen the accused in the Mess Hall before that time?

A. No, sir.

Q. You don't know exactly what time it was?

A. It was sometime between 2300 and 2400 hours. I can now place it closer—between 11:30 and 11:45.

Q. So that it may have been as late as 11:45 when you saw the accused there?

A. Yes, sir.

Q. Would it be as late as 2400 hours you saw the accused?

A. No, sir.

Q. You are sure it was no later than 2345?

A. Quite positive, sir.

Examination by the Court.

Law Member. On 11 July what was the time limit on your passes?

A. 1200 at that time.

Q. Are you sure?

A. I am positive. Because at that time it changed from 1200 to 0100.

The witness was then excused and withdrew from the room.

LaPage Edward R., S/Sgt. 351st Fighter Squadron, AAF Station F-157, a witness for the Defense, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

Q. State your name, grade, organization and station.

A. Edward R. LaPage, S/Sgt., 351st Fighter Squadron, Station F-157.

Questions by DEFENSE:

Q. Sergeant, I direct your attention to the 11th of July 1944. Where were you on that day.

A. Colchester, sir.

Q. What did you do there?

267 A. I was on leave, sir—on pass.

Q. During that day did you have occasion to imbibe?

PROSECUTION. If the court please—

LAW MEMBER. I think the witness understands what he means. Overruled.

WITNESS. Yes, sir. I had a few beers

DEFENSE. How many beers did you have that day?

A. I would say around 10 beers.

Q. What time did you leave Colchester to come home?

A. Well, I would say approximately 20 minutes to 11.

Q. Tell us how you fix that time?

A. In the morning we reserved a cab to come home at 10:30. I imagine the cab wasn't there when we got to the stand. We got there at 20 minutes after 10. We waited 15 or 20 minutes.

Q. You feel certain it was no later than 20 minutes to 11 before the cab came?

A. Yes, sir.

Q. How long did it take you to ride from Colchester to this base?

A. 25 minutes.

Q. When you reached this base, state what happened.

A. We had our passes checked at the gate.

Q. About what time was that?

A. I imagine it was approximately 5 or 10 minutes after 11.

Q. What did you do then?

A. After the passes were checked I went to the barracks and then went over to the Mess Hall.

Q. How long were you in the Mess Hall before someone came in?

A. I would say approximately 5 or 10 minutes.

Q. Who came in?

A. Private Smith.

Q. About what time would you fix that?

A. Between 11:15 and 11:25 or 11:30.

Q. Between 11:15 and 11:30?

A. Yes, sir.

268 Q. You made a previous statement in this case wherein you said you left the Mess Hall at 2200. Do you remember writing that?

A. 10 o'clock?

Q. Yes.

A. I first talked to Lt. Todd and had the 18th and the 11th mixed up.

Q. What do you mean by that?

A. I was called off the line and I went into Lt. Todd's office. This was after the 18th and he asked me my actions and I got mixed up with the 18th and 11th.

Q. You told him on the 18th you came in at 2200?

PROSECUTION. You are asking him about his previous statement—about his activities on the 11th of July?

DEFENSE. That is correct.

DEFENSE. (to witness) Did you subsequently change that and say you had come in at 2300 on the night of the 11th?

A. Yes, sir.

Q. And had made an error on your previous statement?

A. Yes, sir.

Cross Examination.

Questions by PROSECUTION.

Q. Did you say you came in at 2300 hours on the 11th of July?

A. Yes, sir.

Q. Do you remember also telling Lt. Todd you do not remember the exact time the accused and the M.P. came in but that you think it was about a half hour or an hour after you were in the Mess Hall?

A. Yes, sir.

Q. It may have been a half hour or an hour afterwards that the accused came in?

A. I had the 11th and 18th mixed up.

Q. Was it a half hour or an hour?

A. I would say it was a half hour.

Q. Are you sure about that or is your first statement to Lt. Todd correct? Do you want to change your statement now?

A. No, sir.

Q. You are still not sure it was a half hour or an hour?

269 DEFENSE. Objection.

Law MEMBER. Objection overruled.

PROSECUTION. You still think it was a half hour or an hour after you and Sgt. Pleban went to the Mess Hall?

A. I think it was a half hour, sir.

Defense. And you got to the Mess Hall at 11:35?

A. Yes, sir.

Prosecution. If the court please, I have let a number of leading questions go in and I am going to insist now on the Defense asking questions properly and not seek to rehabilitate the witness.

Law Member. I think the T.J.A. is correct. Your questions should be entirely proper.

Defense. May I point out in the testimony this morning, where a girl was being examined, leniency was granted. In view of the mental caliber of this witness I ask the same be allowed.

Law Member. The court doesn't think that.

Law Member. (to witness) When did Lt. Todd take the statement from you?

Witness. I could not tell you. It was after the 18th.

Q. You said you were mixed up on whether it was the 11th or 18th?

A. Yes, sir.

Q. Did you see Pvt. Smith on both the 11th and 18th in the Mess Hall?

A. No, sir.

Q. How could you have been mixed up?

O. On the time of the evening. I told Lt. Todd on the 11th I came from the P.X. to the Mess Hall.

Q. How could you have been mixed up in all in regards to seeing him?

A. Where I was mixed up was my actions before I went into the Mess Hall.

Q. Were you mixed up in your statement when you said Private Smith came in a half hour or an hour after you came into the Mess Hall, regardless of whether it was the 11th or 18th?

A. No, sir.

Defense. I object and ask that be stricken.

Law Member. Overruled.

Witness. I believe it was a half hour. I didn't want to draw any special time. I didn't know what I was talking about.

Q. Why did you tell him it was between an hour and a half hour?

270 A. I wasn't setting no definite time.

Q. What makes you now think it was a half hour?

A. It was while I was eating that Smith came in and it surely wouldn't take me over a half hour to eat.

Law Member. You don't remember the date Lt. Todd took the statement?

A. No.

President of Court. After you arrived on the station the night of the 11th, did anything place the time exactly from the time you came into the gate until the time you left the Mess Hall? Any clock or watch?

A. No, sir. I have my own watch but to place it exactly, no, sir.

Q. You reckon all the time from the time you ordered the taxi in Clochester?

A. Yes, sir.

Q. Who was with Smith when he came into the Mess Hall?

A. Another soldier was with him.

Q. What did they do?

A. They walked by. I recognized Smitty and he recognized me. They went into the kitchen.

The witness was then excused and withdrew from the room.

PLEBAN, STANLEY, E., T/Sgt, 351st Fighter Squadron, AAF Station F-157, a witness for the Defense, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. Stanley Pleban, T/Sgt, 351st Fighter Squadron, AAF Station F-157.

Questions by DEFENSE.

Q. Sergeant, I would like to direct your attention to the night of the 11th of July, 1944. What did you do that evening?

A. At about 9 o'clock I was down at the P.X. drinking beer.

Q. How long did you remain at that time?

A. I would say until about 10:15.

Q. How do you know it was that time?

A. The O.D. comes thru there and makes us get out about that time.

271 Q. Where did you go then?

A. I went to the barracks.

Q. Then what happened?

A. I was around the barracks about a half hour, maybe a little longer—until Sgt. LaPage came in from town and he suggested we get a cup of coffee.

Q. What time did LaPage come in?

A. About 11 o'clock.

Q. Did you go over to the Mess Hall?

A. Yes, sir.

Q. Did you see anybody you now recognize in this court thereafter?

A. Yes, sir.

Q. Who was that?

A. Pvt. Smith.

Q. About what time did you fix that this defendant came into the hall?

A. I would say close on to 11:30, sir.

Q. You are sure it was not later than that?

A. No, sir; it was about 11:30. I wouldn't be exact on the time.

Q. It was not 12 yet?

A. No, sir.

Cross Examination.

Questions by Prosecution.

Q. Did you look at any watch or clock on the evening of 11 July?

A. No, sir, except my own wrist watch.

Q. During the hours between 10:30 and 11:30 or 12:00 did you look at your watch?

A. I don't know that I did, sir.

Q. Do you remember talking to Lt. Todd on or about 22nd of July?

A. Yes, sir.

Q. Do you remember giving Lt. Todd a statement?

A. Yes, I remember.

Q. Do you remember telling Lt. Todd you saw the accused come in with a soldier who was an M.P. some time between 10:30 and 11:30 but that it was probably about 10:45 when he came in?

272 A. No, sir; it was later than that.

Q. Do you remember telling Lt. Todd it was probably 10:45 when you saw the accused?

A. I don't remember telling him that statement.

Q. Will you say you did not make that statement to Lt. Todd that the accused was seen about 10:45 that evening?

Defense. I object. He said he doesn't remember making that statement.

Law Member. Objection overruled.

Witness. No, sir; I wouldn't say I did not.

Prosecution. As a matter of fact, you don't know what time you saw the accused exactly that evening, do you?

A. Not exactly. I said about 11:30, sir.

Examination by the Court.

President of Court. Sergeant, what did you do after you left the P.X.?

A. I came up to the barracks, sir.

Q. What did you do?

A. I was around the barracks I would say a good half hour until Sgt. LaPage came in from town.

Q. You left the P. X. at what time?

A. About 10:15, sir.

Q. Does the P.X. always close at 10:15?

A. They close at 10, but we can leave there at 10:15. It's according to the O.D.

The witness was then excused and withdrew from the room.

SOMERHILL, GRACE, MRS., 63 South Street, Manning Tree, Essex, a British civilian, a witness for the Defense, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?

A. Mrs. Grace Somerhill.

Q. Where do you live?

A. 63 South St., Manning Tree, Essex.

2939 Questions by DEFENSE.

Q. Mrs. Somerhill, how long have you been living at your present place of residence?

A. About 12 to 14 years.

Q. In this 12 to 14 years have you had occasion—you mean in the general community?

A. I was born in this community.

Q. You have lived in this community for 20 years?

A. Yes.

Q. During these years have you had occasion to know the young lady who bears the name of Sheila Winifred Dale?

A. Yes.

Q. What is her reputation in this community for chastity?

PROSECUTION. Objection.

LAW MEMBER. Overruled.

PROSECUTION. May I read an excerpt from Wharton's "Criminal Law", Section 762, as follows. "Prior Chastity of Prosecutrix: The prior chastity of prosecutrix is presumed in law in the absence of statutory provisions to the

contrary, and an attack upon her reputation in this regard and her good reputation therefore cannot be shown until attacked; and where there is no doubt that consent was absent and force was used, evidence of the chastity or unchastity of the prosecutrix is inadmissible."

Their defense is the accused was not there. The issue is not consent and therefore this testimony is not in issue.

LAW MEMBER. Overruled.

DEFENSE. Read the question.

The reporter read the question: "What is her reputation in this community for chastity?"

PROSECUTION. Object again.

LAW MEMBER. Overruled.

WITNESS. Bad.

PROSECUTION. I ask that the answer go out and the court be asked to disregard it. It is not competent or relevant.

LAW MEMBER. The motion to strike is overruled likewise.

DEFENSE. Have you had occasion to know the girl known as Miriam Florence Cullum?

A. Yes.

Q. What is her reputation for chastity?

274 PROSECUTION. I object to that question. We have not here an issue of rape in this case. It is assault with intent to commit rape.

LAW MEMBER. Objection sustained.

Neither the Prosecution nor the court cross-examined the witness.

The witness was then excused and withdrew from the room.

DEFENSE. The Defense rests.

PARTYKA, ANDY, Private, was recalled by the court as a witness, reminded he was still under oath and who testified as follows:

President of COURT. On the night of 11 July when you returned to the station, where did you go after you passed Gate #2?

A. Smith invited me up to the 351st Mess Hall for a sandwich, so I went along with him.

Q. What did you do in the Mess Hall?

A. I stood around about 5 or 10 minutes. Later, four or five fellows came into the Mess Hall.

Q. Did you have any coffee?

A. No, sir; I had a sandwich.

Q. Did you drink any coffee?

A. Yes, sir. Rather, I had a cup of coffee and a sandwich.

Q. Where did you get the cup?

A. Smith gave me his cup.

Q. Where was it?

A. He got it behind the Mess someplace.

DEFENSE. When you say he got a cup from the back of the Mess Hall, you mean he left you and went to another part of the Mess Hall and came back with his cup?

A. Yes, sir.

President of COURT. What do you mean when you say you are "high"?

A. That night I did.

Q. What do you mean?

A. I was feeling good.

Q. Do you stagger?

A. No. I rode my bicycle and knew what I was doing.

275 Q. Could you write your name?

A. Yes, sir.

Q. How much did you have to drink?

A. About 7 or 8 pints of beer.

Member of COURT. Do you remember seeing Sgt. Pellatier in the Mess Hall that night?

A. I believe two sergeants came in.

Q. Do you remember their names?

A. I don't know their names. They were strangers to me.

STERMAN WILLIAM E., Corporal, Hq. Det. 353rd Fighter Group, AAF Station F-157, a witness for the Court, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name, grade, organization and station?

A. Corporal William Sterman, Hq. Detachment, 353rd Fighter Group, Station F-157.

Questions by the COURT.

Law MEMBER. What duty assignment do you perform on the station?

A. Group armament, sir.

Q. On the night of 11 July, 1944, did you have any particular duty in connection with your organization unit?

A. I was Charge of Quarters.

Q. As Charge of Quarters did you have under your supervision the checking in of men who were on pass?

A. That is right, sir. They return their passes and sign in when they come in.

Q. Did you require on that night each man to check in and to put in the correct time he checked in, or did you have the actual supervision of it?

A. I didn't actually check each man. We leave the book on the desk and they bring in their pass and drop it on the desk. Some of the men may come in a little after I turn in.

Q. What time do you turn in?

A. I think that night I did not turn in. I had been reading.

276 Q. Do you remember what time you left the Orderly Room that night?

A. I slept in the Orderly Room. I guess the only time I was actually away from it was at 11 o'clock when I turned out the lights.

Q. Do you remember Smith coming in that night?

A. No, sir.

Q. After you turn the lights out, what procedure is followed by men checking in?

Q. They can turn on the lights, or use their flashlight, open the book and sign in.

Q. Do you have the book for 11 July?

A. Yes, sir.

Q. Is this the official checking book of the Headquarters 353rd Fighter Group?

A. Yes.

Q. Is there any objection to the court looking at this book on the basis of who made the entries, or whose custody the book is, or anything of that kind?

DEFENSE. May I look at the book first?

LAW MEMBER. Yes.

DEFENSE. I have no objection.

PROSECUTION. No objection.

LAW MEMBER. Corporal, will you make a copy of the entries in the Sign-in and Sign-out book for 11 July, 1944 and deliver it to the Trial Judge Advocate, and it will be received in evidence as Court's Exhibit #1—that on the basis there is no objection to a copy being substituted for the actual pages of the Sign-in and Sign-out book.

PROSECUTION. No objection.

DEFENSE. No objection.

LAW MEMBER. Do you happen to know what was the time limit on passes in your unit on 11 July?

A. I am not certain about it.

DEFENSE. Isn't it a fact, Corporal, the boys in your organization have come in while you were asleep and signed it unbeknown to you?

A. Yes, that is possible.

Q. And they usually don't sign in the actual time of coming in, but rather some arbitrary time before the expiration of their pass?

277 PROSECUTION. Objection.

LAW MEMBER. If he knows, he may answer.

WITNESS. Not to my knowledge.

DEFENSE. You mean if a man comes in at 11:30 he signs in at 11:30?

WITNESS. It might have been done but I have never seen it.

LAW MEMBER. You mean by yours answer that a man should sign in the actual time he comes on the post? It is supposed to be the time he comes in the Orderly Room.

DEFENSE. May I direct your attention to the first three entries of the book dated 7/11/44? The first one is 2300. The second is 2300. The third 2400. The fourth one is 2350, is it not?

WITNESS. That's right, sir.

DEFENSE. I now direct your attention to the entries under the date of 7/12/44. The first one on that line is 2300. The second is 2300. The third is 2300. The fourth is 2315 and the fifth is 2000. Is that correct?

WITNESS. That is right, sir.

PROSECUTION. Corporal, what does this represent as to the columns on the report?

WITNESS. The first column is the date they sign out; the second is the time; the name is the third; the destination is the fourth. When they return they put in the time again.

Q. So that the discrepancy between the hours means that a man must sign in the place he himself first signed out, in order to keep your records right?

A. That is right, sir.

MACGREGOR, ERNEST P., Captain, AC, Hq, 353rd Fighter Group, AAF Station F-157, was called by the court as a witness, was sworn and testified as follows:

Direct Examination.

Question by PROSECUTION.

Q. State your name, rank, organization and station.

A. Ernest P. MacGregor, Captain, AC, Hq, 353rd Fighter Group, AAF Station F-157.

Q. Do you know the accused in this case?

A. I do, sir.

Q. Is he in the military service of the United States?

A. He is.

Examination by the Court.

Law Member. You are the Commanding Officer of Headquarters, 353rd Fighter Group?

A. Yes, sir.

Q. Is the check-in and check-out book, just identified by Corporal Sterman, a part of the records of your organization?

A. Yes.

Q. Can you tell the court the time a member of your organization is supposed to check in, *i. e.*, is it the time at which he comes on the post or the time he actually checks himself in?

A. He is supposed to check in the time he comes into the Orderly Room.

The witness was then excused and withdrew from the room.

PELLETIER, JOSEPH C., Sergeant, was recalled by the Court as a witness, reminded he was still under oath and testified as follows:

Law Member. You testified about a man injuring himself opening a can.

A. Yes, sir.

Q. In what size cans is the milk supplied to your mess?

A. In small cans—half pint cans.

Q. Is that the only kind you get?

A. No, we also get the powdered milk cans.

Q. How do you open a can of liquid milk?

A. With a cleaver.

Q. Do you take the top off completely?

A. No, sir; just slit the top of the can.

Q. Do you just knock a couple of holes in it?

A. No, sir; take it right out of the can and put it in a 2½ gallon bucket.

Q. How is the can opened?

A. It is slit in the middle with a cleaver. They make one long slit in the top of the can.

Q. How do you open your powdered milk cans?

A. Some come in with a sort of metal opener on the cans, but others we have to open. We open the 5-gallon cans with a cleaver. It is a sort of very thin metal that can be cut with a knife.

279 President of Court. Do all cooks open cans that way?

A. That is the way we were opening them at that time.

Q. Do all cooks put one slit down the center?

A. On the milk cans, yes.

The court then at 10:50 P. M. on 25 August 1944, adjourned to meet at 9 o'clock, A. M., on 26 August 1944.

HARLEY J. MCNEAL,
Captain, J.A.G.D.,
Trial Judge Advocate.

VIII FIGHTER COMMAND,
AAF Station F-157,
26 August 1944.

The court met, pursuant to adjournment, at 9 o'clock A. M., all the personnel of the court, prosecution, and defense, who were present at the close of the previous session in this case, being present.

The accused and the reporter were also present.

BAKER, CYRIL, BUCKS HORN INN, Cadway, Brantham, England, a British civilian, was called as an additional witness by the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name.

A. Cyril Baker.

Q. Where do you live?

A. Bucks Horn Inn, Cadway.

Q. Is the Bucks Horn located in Brantham?

A. Well, it is not exactly in Brantham, really.

Q. Do you operate the Bucks Horn public house?

A. Yes, sir.

Q. You are the owner?

A. Yes, sir.

Q. Calling your attention to the 11th of July 1944 were you in the Bucks Horn on that day?

280 A. Yes, sir.

Q. Could you advise the court at what time you closed your pub on that date?

A. 10:30.

Q. Approximately what time was it your public house was cleared of people who had had their last drinks?

A. About 20 to 11. I call time at 20 past and close at 10:30.

Law Member. That is your regular closing time?

A. Yes, sir.

Q. And that was the time on the 11th of July?

A. Yes, sir.

Cross Examination.

Questions by Defense.

Q. What makes the 11th of July stand out in your memory now?

A. We always close it up at that time.

Q. Isn't it a fact if you sell out your goods earlier, you close earlier?

A. I get my supply Mondays so I am always open on Tuesdays.

Q. Could it reasonably have been on that particular Tuesday you sold out because of a particular rush?

A. I had been sold out on Tuesdays.

Q. And you have closed earlier, even on Tuesday nights?

Law Member. Let's keep it to July 11th. That is the night in question.

Defense. You say that on some Tuesday nights you have closed earlier than 10:30?

Witness. I have been closed, but I have never been closed before 10:30 on Tuesday nights.

Q. How do you figure your goods? Do you apportion a certain amount for each evening?

A. No, I sell the bottled stuff early in the week and finish up on draught. When I finish up the draught, I have done it.

Q. You don't divide up between the 7 days of the week?

A. No.

Q. Then I understand you correctly when you say on Tuesday nights you have never closed your place before 10:30?

A. Only in the winter months, because we are open then from 6 to 10 P. M., but during the summer months we are open from 6 to 10:30.

281 Q. Will you explain to the court what you meant by 10:30? At what time do you call "Time."

A. At 10:30, but I keep my clock fast 10 minutes, so it was really 20 minutes after.

Q. Then everybody is outside of your pub at the real time of 10:30?

A. Yes.

Q. You keep your clock fast 10 minutes?

A. Yes.

The witness was then excused and withdrew from the room.

BOAST, EMILY REBECCA, The Ark, Brantham, England, a British civilian, was called as an additional witness by the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name.

A. Emily Rebecca Boast.

Q. Where do you live?

A. The Ark.

Q. Where is The Ark located?

A. Brantham.

Q. Are you the owner and proprietor of the Ark?

A. The license holder.

Q. Were you in the Ark public house on 11 July 1944?

A. Yes.

Q. At what time did you close the Ark on the 11th of July 1944?

A. 10:30.

Q. At what time do you call "Time", or did you call "Time", if you can remember, on the 11th of July 1944?

A. Always call it at 10:30.

Q. At what time are the people out of the public house?

A. As soon as they drink up and get out.

Q. And approximately what time would that be?

A. A few minutes after.

282 Q. About how many minutes?

A. Five minutes.

Examination by the Court.

LAW MEMBER. Do you know the private seated the second from your right? (Indicating the accused.)

A. Yes, I have seen him, haven't I?

ACCUSED. I believe you have.

Q. Do you recall him being in your public house on the 11th of July?

A. I couldn't remember that.

Member of COURT. He has been there on many occasions, is that why?

A. On several occasions, yes.

The witness was then excused and withdrew from the room.

KELLY, BERNARD F., 1st Sgt., Hq. 353rd Fighter Group, AAF Station F 157, was called by the Court as a witness, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. Bernard F. Kelly, Acting First Sergeant, 33191697, Hq. 353rd Fighter Group, Station F 157.

Questions by DEFENSE.

Q. Are you the First Sergeant of the 353rd Fighter Group?

A. Yes, sir.

Q. In connection with that duty, do you supervise the sign-roster?

A. Yes, sir; I do.

Q. Can you tell us what the general procedure is with reference to signing in—concerning the time that members of your organization sign in?

A. They sign in nearest the hour they come in.

Q. Do you mean by that if a boy came in at 11:35, he would sign in 12:00?

A. No, sir; 11:30 probably.

Q. If he came in at 11:10?

A. He would sign in possibly 11:15 or 11:00.

LAW MEMBER. Come in where?

283 DEFENSE. I will cover that.

DEFENSE. (To witness) What would be the procedure if a soldier of your organization came in to the Main Gate at 11 o'clock and then proceeded to the Mess Hall, where he spent some time—which time would he sign in, the time he came into the gate or the time he finally reached the Orderly Room after having been at the Mess Hall?

PROSECUTION. I object. It is purely speculative as to what anyone would do.

DEFENSE. That has been the evidence here and is a proper question.

LAW MEMBER. I think that is correct. He can testify both as to the general practice as you call it and in regard to what instructions there are in force and effect in respect to men signing in.

WITNESS. I would say the men usually sign in at the time they finally turn in. By that I do not mean the time they come to the gate, but—

LAW MEMBER. As of what time? The time they came on the field or the time they actually sign in?

A. I would say at the time they came on the field.

Q. Do you have any directives out in connection with that?

A. No written directives.

Q. Any oral directions or orders?

A. No, sir.

Q. What is the purpose of the book?

A. To see when the men have signed in, or when they have signed in later than they are scheduled to be at the station.

Q. The purpose is to fix the time when they come on the station, not the time they actually sign the book?

A. It is the understanding they sign the book at the time they are coming in.

Q. Coming in where?

A. Turning in for the night. Turning in to their particular unit.

DEFENSE. As a matter of fact, if they come to the gate at one time and spend some time elsewhere, there have been a number of cases where they have signed the book—

PROSECUTION. I object to the question. It is leading.

LAW MEMBER. If he knows, he may answer.

WITNESS. That is true, sir. That has happened before.

LAW MEMBER. The book is kept there for a definite purpose?

WITNESS. That is true.

284 Q. That is to record a time a man checks in?

A. That is correct.

Q: What time is he supposed to ~~be~~ check in that book, according to the orders outstanding: the time he checks in the station or the time he checks in at the Orderly Room.

DEFENSE. Object to that. He has already said there are no written directions; only oral.

LAW MEMBER. Overrule the objection.

LAW MEMBER. (to witness) Tell the court, what is the purpose of the book and what have the men been told with regards to signing in, if they were told anything?

A. We must be in the station by 0100 hours and the men know they must sign in before that hour.

Q. In other words, they must sign when they leave the station and when they come back? It is immaterial to you whether they sign in as of the time they come on the field or the time they check in at the Orderly Room, just so it is before 0100 hours?

A. That is correct, sir.

Q. On 11 July 1944 what was the time limit on your passes? 11:30 or 0100?

A. The pass shows 0100 but our practice has been to stay out until 2400.

Q. Do you issue passes?

A. Yes, sir.

Q. At that time how did your passes read?

A. The reverse side of the Class B reads that the men will not be on the streets after 0100 to 0500 in the morning. That is a mimeographed pass issued by this station.

Q. That was the pass being used on 11 July 1944?

A. Yes.

DEFENSE. At the time you issued those passes, was it your understanding they would not use them after midnight?

A. That is right.

PROSECUTION. Sergeant, isn't it a fact that the passes read "1800 to 0100 hours" as to the times they may be off the post?

A. I don't know the exact wording of it, but they may not be on the streets during 0100 and 0600.

Q. You don't know about the hours of 1800 to 0100?

A. No, sir.

285 Q. Isn't it true that men coming in the Orderly Room sign the time they come in the Orderly Room.

A. I would say they sign in from the time they come in the station.

Q. You wouldn't say they sign in from the time they come in the Orderly Room?

A. No, sir, I wouldn't.

Q. You don't know, one way or the other.

A. For myself, I have come on the station at 11 o'clock and have stayed around the area until 11:30 and have still signed in at 11.

Q. But you don't know one way or the other how the men signed?

A. No, sir; I don't.

The witness was then excused and withdrew from the room.

DEFENSE. The Defense rests.

LAW MEMBER. The court has indicated that the girls who are implicated in this case, having been objects of these alleged attacks, might be present during the summation. The only reason they have been kept out during the course of the trial is the fact that they may have been further called as

witnesses. Before hearing any objections, I wish to say it is the policy of this theater, in furtherance of a desire that British civilians shall sit so that the British civilians can see the proceedings are not a white wash of the accused, if guilty, and interested parties shall be allowed to be present in the court. In furtherance of that policy and in furtherance of what the court believes to be a worth while principle, the court is of the opinion the girls should be allowed to come in during the summation.

DEFENSE. Defense Counsel desires to object most vigorously to the admission of the prosecutrixes of this case during the summation by Counsel. It is the feeling of the Defense Counsel that by virtue of the presence of these girls it very well may come to pass that facial expressions by them during the argument by either the T.J.A. or the Defense Counsel, observed by this court, would tend to influence the court in its decision. Secondly, it is the feeling of the Defense Counsel, by virtue of what very well may be said and may have to be said concerning these girls, it is reasonable to assume there very well may be outbursts by these girls which would not be proper for the court to view. Finally, by virtue of the Defense Counsel's feelings with reference to the alleged crime and the concomitant necessity of the Defense Counsel to speak with reference to the character of these girls, it is the Defense Counsel's feelings he may be restricted by virtue of their presence and I therefore ask the court be closed to them.

The court was then closed and the matter was voted upon. The court was then re-opened. The personnel of the court, prosecution and defense, and the accused and the reporter resumed their seats.

President of COURT. The court has decided that the two girls concerned, the parents of the girls, the Chaplain and the Commanding Officer of the defendant will be admitted during the argument.

The two girls, Sheila Dale and Miriam Cullum, the Chaplain and the C. O. of the defendant were admitted to the court.

286 PROSECUTION. I might say for the record that Constable Felton was advised to tell the Chairman of the Council of the community as to the date of the trial; and also advised the Chairman that the trial was open to British civilians and that they were free to come.

Asst. T. J. A. The British civilians here this morning were also so advised.

PROSECUTION. Prosecution has nothing further.
DEFENSE. Defense has nothing further.
The Prosecution then made a closing argument.
The Defense made a closing argument.
The Prosecution made an argument in rebuttal.

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Note to Reporter. Read carefully all footnotes and instructions on back of Cover Sheet.

If extensive alterations of the printed form are required to make it mark the truth, use a plain sheet of paper and type what actually occurred, using the form as a model to the extent that it is applicable.

(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

FINDINGS

Neither the prosecution nor the defense having anything further to offer, the court was closed, and upon secret written ballot ~~two-thirds~~[1] all of the members present at the time the vote was taken concurring in each finding of guilty, finds the accused:[2]

H.J.M.N D.P.G.

Of all Specifications and Charges—Guilty

PREVIOUS CONVICTIONS, ETC.

The court was opened, and the trial judge advocate stated, in the presence of the accused and his counsel, that he had evidence of one previous conviction to submit, which was received without objection and read to the court, and is appended hereto, marked Prosecution's Exhibit 3.[3]

The trial judge advocate then read the data as to age, pay, and service as shown on the charge sheet, and verified by the accused in open court, as follows:

[1] In a proper case (e.g., where the death sentence is mandatory) See A. W. 43a the trial judge advocate should line out this word and enter in its stead, authenticated by his initials, "three-fourths," or "all."

[2] Findings and sentence should be announced and recorded in one of the prescribed forms, or in appropriate combinations or modifications thereof. See pp. 64-65 and 273-274, M. C. M.

[3] In case there are "no" previous convictions, so state, and draw a line through the space after "Exhibit." If objection is made to evidence of previous convictions, or to data read from the charge sheet, the proceedings had thereon will be recorded. This sheet will in that case be used as indicated in the Instructions on the Cover.

Age 33 yrs 4 mos. Pay, $67.00 per month. Allotments to dependents: Class "F", $22.00. Class "E", None per month. Government Insurance deduction, $7.25 per month.

Data as to service: Prior Service: U. S. Navy 11 May 1928 to 11 May 1932 (Character of discharge: Undesirable) Current Enlistment: Enlisted at Syracuse, New York, 2 May 1942 for the duration of war plus six months.

Data as to restraint of accused: Placed in confinement at Station guardhouse, AAF Station F 157, 1080 hrs, 18 July 1944.

SENTENCE

The court was closed, and upon secret written ballot, all

J McN P.G. ~~two-thirds~~ of the members present at the time the vote was taken concurring, sentences the accused:

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life.

The court was opened, and the president announced the findings and sentence.

The court then, at 1:55 o'clock, P. M., 26 August, 1944, ~~proceeded to other matters~~ adjourned to meet at the call of the president.

Examined by Defense Counsel before authentication, per par. 45 b, M.C.M.
(Initials of Def. Counsel) WK

AUTHENTICATION

HARLEY J. MCNEAL,	DONALD P. GRAUL,
Captain, J.A.G.D.,	Colonel, Sig C,
Trial Judge Advocate.	*President.*

C.M. Form 18—Record of Trial, G.C.M.

Hq SOS 2-43 5M 6304

HEADQUARTERS
VIII FIGHTER COMMAND
Office of the Commanding General
APO 637 AAF Station F 341

20 September 1944

In the foregoing case of Private Bernard W. Smith, 32286877, Headquarters Detachment, 353rd Fighter Group, the sentence is approved. The United States Penitentiary at Lewisburg, Pennsylvania, is designated as the place of confinement. Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld.

FRANCIS H. GRISWOLD,
Brigadier General, U. S. Army,
Commanding.

Prosecution's Exhibit 3

Note: Include only such evidence as is admissible in this case. See rule in footnote.

(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

EVIDENCE OF PREVIOUS CONVICTIONS

in case of

Smith	Bernard W.	32286877
(Last name of accused)	(First name and middle initial)	(Army Serial No.)

Pvt.	Hq. Det. 353rd Fighter Group.
(Rank)	(Organization)

Date of current enlistment : 2 May 1942
Date of offense here charged : 11 July 1944
Dates AWOL during current enlistment : 13 Sept to 21 to Oct. 1942
1 Jan to 9 Feb. 43.
2 April to 14 April 1943.

(EXTRACT COPY OF SERVICE RECORD OF ACCUSED)

RECORD OF TRIALS BY COURTS MARTIAL

Special C.M. 61st A.W. Date of offense: 2 August, 1943.
Synopsis of specifications: AWOL from his Station from August 2 to August 7, 1943.
Sentence or acquittal announced and adjudged 14 August, 1943.

Sentence as approved: Confined hard labor for six (6) months and forfeit $25.33 of his pay for six (6) months.

Approved 14 August, 1943.

I certify the above is correct.

HOWARD C. WIENER, JR.,
1st Lt. Air Corps, Adjutant.
(Name, grade and organization)

..... C.M. ..... A.W. Date of offense ....., 19...

Synopsis of specifications: .....

.....

Sentence or acquittal announced and adjudged ....., 19...

Sentence as approved: .....

.....

..... Approved ....., 19...

I certify the above is correct.

.....
(Name, grade, and organization)

..... C.M. ..... A.W. Date of offense ....., 19...

Synopsis of specifications: .....

.....

Sentence or acquittal announced and adjudged ....., 19...

Sentence as approved: .....

..... Approved ....., 19...

I certify the above is correct.

.....
(Name, grade, and organization)

I certify that I am the official custodian of the Service Record of the above named accused, and that the above RECORDS OF TRIALS BY COURTS MARTIAL are true extract copies of all entries therein relating to previous convictions which may properly be admitted in evidence in this case.

The above true copies of the record of 1 previous convictions made in 1 sheet at AAF Station F-157 this 19th day of July, 1944.

ERNEST P. MACGREGOR,
(Name typed)
CAPTAIN Hq. Det. 353rd Fighter Gp.
(Rank) (Organization)

Note—Evidence of previous convictions must relate to offenses committed during the current enlistment of the accused and within one year preceding the commission of the offense here charged, time absent without leave excluded.

For more complete statement of this rule, and for the rule as to previous convictions of persons other than enlisted men, including general prisoners, and as to the proper form of evidence of convictions, see paragraph 79c, (p. 66), M. C. M.

If there are more previous convictions than provided for above, line out the certificate (by a single diagonal line from upper left to lower right) and enter thereunder "Continued on next sheet." Line out in the manner any part of the form above the certificate (on the last sheet) which is not filled in.

8—Evidence of Previous Convictions

Hq SOS USAPP 10-43-25M-16052

290 *Prosecution's Exhibit 1*

Skirt belonging to Sheila W. Dale:

Plaid material: having several pleats down the front, also a strain on the back.

291 *Prosecution's Exhibit 2*

Knickers belonging to Sheila W. Dale:

Pale blue rayon knickers—having a strain on the fork.

292 STATEMENT OF SHEILA WINIFRED DALE. N.R.I.C. TXKK. 65, Factory Hand, age 20, of Victoria Cottages, Station Road, Lawford. States on 12.7.44:

At 8.45 pm on Tuesday, 11th, July, 1944, I returned from Ipswich to Manningtree by train. I was with my sister Rita. We walked home from the station. I stayed at home and at 9.20 pm. my sister Pam came in with two American soldiers who I know as Kentucky and California. I do not know their proper names. They stayed in the house until about 10.30 pm. when Pamela and I decided to cycle as far as Bergholt with them. When we got to Bergholt we all stopped. We separated and I went along the road with Kentucky

for about 50 yards and stood talking to him. After about 10 minutes my sister shouted out to me that she was going home and shortly afterwards the soldier California went passed riding his cycle. I left Kentucky and started to ride home. While I was with Kentucky I had no sexual relations with him and never have.

Just before I got to the Bucks Horns P.H. Brantham I saw an American soldier riding a cycle towards Bergholt. It was getting dark and I was walking as I had no lamps. As the soldier got near me he said, "Are you going home how far are your going?" I did not answer him. He then turned round and cycled slowly beside me. He got off near the brick bridge near the river and said, "How much further have you got to go?" I said. "Not far". He said, "Manningtree?" I said, "Yes". He then said, "You have got to stop here". I said, "I am not going to stop". I could smell he had been drinking. To get away from him I got on my cycle and rode along the Ipswich Road towards Manningtree Railway Station. He started to cycle beside me and said, "I am going to see you home".

When we got to the footpath which leads from the Ipswich Road into Station Road he said, "You can take a short cut that way". I said "No, I cannot get home that way". About 100 yards further down the road he said, "You have got to stop here whether you like it or not". He got off his cycle and shook the handle-bars of my cycle. I fell off and the soldier dropped his cycle in the road. He threw mine in the long grass beside the road. He then put his cycle in the grass.

I started to run away, he ran after me, and pulled me onto the grass and pushed me down. I said, "If you don't let me go my father will come along in a minute." I made more excuses to try to get away and said, "The grass will spoil my clothes". He said, "I will take me coat off". I then managed to get up and ran away screaming. He ran after me and pushed me down again. He put his hands around my neck and said, "If you don't shut up I will murder you. I am not going to hurt you". He pulled my skirt up and tried to pull my knickers off. I struggled and screamed but he managed to pull them off one leg. He put one hand over my mouth and pulled one of my legs apart.

He laid on that one and pulled the other one open. He put his mouth on my private parts and I could feel him sucking me. All the time I was trying to get away and screaming. He did this for some time. He then stopped and laid on top of me. I screamed and said "I will see you another night". He would not let me go. I then felt his person being put in my private parts. I cannot remember seeing him take it out of his trousers. I started to scream again and he said, "If you don't stop screaming I will hurt you more". He then started saying "Fucking lovely cunt". During this time he was moving up and down on top of me and I could feel his person moving in my private parts. After
293 a while he got off and I could feel some fluid on the top of my legs and private parts.

The soldier got up and buttoned his trousers and coat up. I did not see his person. I got up and pulled my knickers up and my skirt down. I said, "Will you get my cycle?" He went and got it and said, "Do you want me to see you home?". I said, "No, I will go home alone". He said, "Will you see me again?" I said, "Yes", so that I could away. He said "Will you make it Thursday?" I said "What time?" He said, "Seven o'clock on the bridge over there, make it the second bridge."

He then let me go home and on the way I did not pass anybody. I got indoors just after twelve. I have never seen this soldier before. He was about 5'10", fair hair, round faced, American soldier's uniform, no hat, teeth widely spaced, with some missing at the top left. I feel sure that I could recognize him again. I cannot describe his cycle. It is not the first time a man has had intercourse with me. When I got home, I complained to my mother.

At 7.15 p.m. on Tuesday 18th July, 1944, I attended an identification parade at Raydon Aerodrome. I picked a man out, who was paraded with fifteen other men, as the one who had assaulted me on Tuesday 11th July, 1944. I had not seen this man between the day of the assault and the identification parade.

s/

D. J. Felton (Witness) (Signed) S. W. Dare.
P. c. 305, Mistley.

Original statements in the pocket book of P. c. 305 Felton, Pages Nos. 112-119, and 141, taken at 10.30

am. 12.7.44, at Dr. Beckett's Surgery, Manningtree, and at 7.45 pm. 18.7.44. at Raydon Aerodrome, respectively.

CERTIFIED TRUE COPY.

E. W. SHEPHERD,
Detective Sergeant.

A TRUE COPY.
/s/ ALAN B. TODD,
1st Lt. Inf.

CERTIFIED A TRUE COPY
HARLEY J. MCNEAL,
Captain, JAGD,
Asst. Staff Judge Advocate.

294 *Court's Exhibit 1*

PASS SHEET

SIGN OUT				SIGN IN		
Date	*Time*	*Name*	*Destination*	*Date*	*Time*	*Name*
7/11/44	1800	Kuttner	Local	7/11/44	2300	Kuttner
7/11/44	1800	Guest		7/11/44	2300	Guest
7/11/44	1800	Frazier	Local	7/11/44	2400	Frazier (Bfk)
7/11/44	1800	Simpson	Local	7/11/44	2350	Simpson
7/11/44	1840	Smith	Local	7/11/44		
		Henderson		2300	2300	Smith
9/12/44	1800	Ipswich	Ipswich	7/12/44	2300	Henderson
9/12/44	1800	Buhrer	Local	7/12/44	2300	Buhrer
				7/12/44		
7/12/44	1800	Feller		2340	2300	Feller
7/12/44	1830	Paris	Local	7/12/44	2315	Paris
7/12/44	1830	Simpson	Local	7/12/44	2000	Simpson
7/12/44	1830	Wozniak	Local	7/12/44	2330	Wozniak
7/12/44	1830	Streb	Local	7/12/44	2300	Streb
7/12/44	1830	Czytyrbok	Local	7/12/44	2300	Czytyrbok
7/12/44	1930	Chiaramonte	Local	7/12/44	2330	Chiaramonte
7/12/44	1930	Scaible	Local	7/12/44	2300	Schaible
7/12/44	1930	Meisberger	Local	7/12/44	2350	Meisberger
7/12/44	1930	Davis	Local	7/12/44	2400	Davis

A TRUE COPY
ERNEST P. MACGREGOR,
Captain, Air Corps.

295 *Defendant Exhibit B*

STATEMENT OF MIRIAM FLORENCE CULLUM, aged 19 years, No. 57, Colchester Road, Lawford Armament Worker, who saith:

At 10.40 p.m. on Tuesday 11th July, 1944, I left my boy friend's mothers house a Brantham to return to my own house at Lawford. I was accompanied by his sister, Mrs. Stella Kerry, who was going to walk part of the way home with me. I had my cycle. As we reached the corner just before Brantham Hall, an American soldier passed us on a cycle going in the direction of Ipswich. He did not speak to us. When we reached the entrance to the new village, near the school, the same American came from behind and started to cycle beside us. He said, "Good evening, girls". We never answered him. He then said to me, "Who is your girl friend?" I never answered him but, Mrs. Kerry said "No, good night". Two special constables, then passed going up the hill and he said "Goodnight" to them.

By that time we had almost reached the Ark P.H. When Mrs. Kerry said, "No, Goodnight", the American cycled on towards the Crown P.H. She then said "Goodnight" to me, turned round and went home. I got on my cycle and started to come home.

When I reached the Crown P.H. I passed the American who had stopped near the kerb. When I got half way between the two bridges, the soldier caught me up and said "Hullo, again. Can I see you home". I did not answer him. He said "Please". I said "No, thank you". He said "Why, won't you speak to me?" I said "I don't talk to strangers".

We had almost reached a small bridge near a cottage, when he said, "You are not going any further". He turned the front wheel of his cycle into my front wheel and turned the handlebars of my cycle. I fell off and struck my head on a telegraph pole. My cycle fell half on the road and half on the grass. Before I could get up, he pulled me across the road and tried to drag me into a corn field. I pulled his hair, screamed, and kicked him. He let me go and as I fell down he tried to kick me. His foot caught my back. He also hit me with his fist on the head. As he dragged me across the road, he said "You've had it. I am going to fuck you". He repeated this a number of times. I screamed again and he put his hand over my mouth and said "Shut up". I bit his right hand and he caught me around the throat. I screamed and kicked him. He looked over my shoulder and let go of my throat. I ran across the road, he followed me and pushed me onto my cycle. He

pick his cycle up and rode off towards Brantham. Two men then came along from the direction of Brantham. They were a soldier and a civilian who I know as Frank Welham. They saw that I was crying and said, "Is he the Yank?" and I said, "Yes" and told them what had happened. The soldier came home with me.

When I got home I complained to my parents of having been assaulted by an American soldier. The soldier was about 25 years old, 5'9"-10", fair hair, parted on left, round face, teeth spaced with some out at the top left, staring eyes, wearing side hat, American soldier's uniform, no stripes, brown boots or shoes, riding an upright cycle, khaki colour. I could identify him again.

At 7:15 p.m. on Tuesday 18th July 1944 I attended an identification parade at Raydon Aerodrome. I picked a man out of fifteen others as the one who had assaulted me on the 11th July, 1944. I have not seen this man between the time of the assault and the identification parade.

s/ D. J. Felton (Witness) (Signed) Miriam Cullum.
P.c. 305, Mistley.

296 *Government's Exhibit No. 2*

Not formally identified and marked by the Reporter at the time of trial but handed to the Court. Is now identified as Government's Exhibit No. 2 and filed with the Clerk of the Court at Lewisburg, Pa.

Official Court Reporter.

Filed:
Jul 1 1947.
Per F. H. Campion, Clerk

297 UNITED STATES OF AMERICA
WAR DEPARTMENT

Washington, 22 January, 1947

I HEREBY CERTIFY that I am the Adjutant General of Army and that the attached two (2) page document is a true and correct photostatic copy of W.D. A. G. O. Form No. 170, "Application for Appointment and Statement of Preferences for Reserve Officers," pertaining to Harry Lieberman, O-1551668, the original of which is on file in my office.

Edward F. Witsell.
Major General
The Adjutant General

I HEREBY CERTIFY that Major General Edward F. Witsell, who signed the foregoing certificate, is the Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF, I, ROBERT P. PATTERSON, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Deputy ~~Assistant~~ Administrative Assistant of the said Department, at the City of Washington, this twenty-second day of January, 1947.

(SEAL)

ROBERT P. PATTERSON
Secretary of War.
By JAMES C. COOK
~~*Assistant*~~ *Administrative Assistant,*
Deputy

War Department
Form No. 7

298 *Application for Appointment and Statement of Preferences for Reserve Officers*

(See instructions on back)

From: Lieberman Harry (NMN)
(Last name) (First name) (Middle name)

Date July 8, 1942

To: The Adjutant General, Washington, D. C.
(Through Corps Area or Department Commander)

I hereby make application for appointment as Second Lieutenant Ordnance in the Officers' Reserve Corps.
(Grade) (Section)

In connection with the application I submit the following information, which I certify to be correct to the best of my knowledge:

1. Permanent address: 5823 Beacon Street
   Pittsburgh, Penna.
2. Date of birth: Aug. 18, 1908 White or colored: White
   (Month) (Day) (Year)
3. Place of birth: Imperial, Penna.
4. State whether or not you are a citizen of the United States and whether by birth or naturalization. (If the latter, append evidence of naturalization, or if evidence not available, state on what date and in what court naturalized.)
   Yes By birth
5. Married or single: Single
6. Number of minor children: None

7. Name of nearest relative, giving relationship and address, including street and number:
Lizzie Lieberman Mother
5823 Beacon Street
Pittsburgh, Penna.

8. Father's name†: Lieberman Simon (NMN)
(Last name) (First name) (Middle name)
Father's address: Deceased
(Number and street, or rural route)
(City, town, or post office) (State or country)
Father's birthplace: Russia
If of foreign birth, state whether or not naturalized. (If naturalized, state on what date and in what court.)
Yes, date and court unknown.
Mother's name†: Lieberman Lizzie (NMN)
(Present last name) (First name) (Middle name)
Mother's address†: 5823 Beacon St.
(Number and street, or rural route)
Pittsburgh Penna.
(City, town, or post office) (State or country)
Mother's birthplace: Russia

9. Marksmanship, giving year of qualification:
Rifle: None
Pistol: None

10. Languages:

	French	*Spanish*	*German*	*Other*	*Other*
Speaks fluently					
Speaks fairly		None			
Translates					
Reads					

11. Special knowledge, professional or other: Law
12. Present occupation, years of experience in same and name and address of employer, if any: Until Mar. 10/42 practiced law ten years
13. Experience in other lines and years of same: Wholesale shoe business—advisory capacity—six years
14. Schools attended, other than graded schools, including service schools:

Name of school	*Number of years attended*	*Graduated? Yes or No*	*Year*	*Degrees*
Univ. of Pgh.	4	Yes	1928	B. S.
Univ. of Pgh. Law School	3	Yes	1931	LL. B.

Subjects specialized in: Business Administration Law

15. Campaigns and battles participated in (give dates): None

16. Decorations, citations, and commendations (attach copies): None

17. Wounds, giving date and place of occurrence: None

18. State membership in professional societies: None

19. Are you at present a member of the Regular Army, Enlisted Reserve Corps, or federally recognized in the National Guard? If so, state which, giving grade and organization or arm or service and date of expiration of enlistment: Member of Regular Army. Private in 631st T. D. Bn. Duration & six months.

20. Chronological statement of service in the Army, Navy, Marine Corps; including service as a cadet at U. S. Military or Naval Academy, National Naval Volunteers, National Guard in Federal service, as a Reserve officer on active duty, or at military training camps, or as a contract surgeon serving full time, or as a student in the C. M. T. C. or R. O. T. C., Basic Course, Advance Course, and Advanced Course camp, giving inclusive dates for each by day, month, and year.

From	To	Station	Grade	Organization	Duty	Full name and grade of immediate commanding officer
3/10/42	5/16/42	Camp Bowie	T Pvt	631 T. D. Bn	Basic Training	Eugene A. Laprant Capt. F. A.
5/16/42	7/ 8/42	Camp Bowie	T Pvt	631 T. D. Bn	Radio School	Bernie D. Johnson 1st Lt F. A.

21. Were you ever rejected for any branch of the military service: No or for the R. O. T. C. No or C. M. T. C. No? If so, state when and where rejected and cause: .....

MILITARY SERVICE OTHER THAN ABOVE

22. Service in Officers' Reserve Corps (inactive); National Guard of the United States; Enlisted Reserve Corps (inactive); Naval or Marine Corps Reserve Forces

* In giving the names of the father or mother, if either is deceased, it will be noted following the name.

† In giving the mother's last name, that which she bears at present will be given.

‡ If the mother's address is the same as the father's, it will be so noted and not repeated.

(inactive); National Guard or Naval Militia not in Federal service, or in military or naval forces of foreign countries: None

23. Prior service in Coast Guard, Public Health Service, or Coast and Geodetic Survey: Give dates and nature of service. None

24. Have you ever been convicted by a civil or military court? If so, give the date and circumstances. No

REMARKS.—State any other information you may desire to submit for consideration: None

(Signature—Sign all names in full)

HARRY (First name) (Middle name) LIEBERMAN (Last name)

(Name typed) HARRY LIEBERMAN, Pvt.

INSTRUCTIONS

1. Fill out on typewriter, if practicable; if not, print proper names and write clearly. This form must be executed IN DUPLICATE and both copies forwarded through the corps area or department commander to The Adjutant General. EACH COPY MUST BE SIGNED.

2. Applications will be accompanied by a Report of Physical Examination (W. D., A. G. O. Form No. 63), which may be obtained from any military post or station. Physical examination should preferably be by a medical officer of the Regular Army, Officers' Reserve Corps, National Guard, or Public Health Service. If applicant so desires, the examination may be made by a reputable private physician.

3. If the applicant is in the military service, application will be forwarded through military channels.

4. If appointment is sought with a view to assignment to a particular unit of the Organized Reserves, that fact will be stated under "Remarks."

5. Under "Remarks" make appropriate explanation, when other allotted spaces are insufficient, and any statement you may wish to make with regard to your preference for duty and any recommendation which you may have received for promotion, giving full name and grade of recommending officer.

6. Under "Chronological Statement of Service" state duty specifically, as "regimental adjutant," "company commander," etc., NOT in general terms, as "regimental duty," "staff duty," etc.

301 In the District Court of the United States
For the Middle District of Pennsylvania

In the Matter of the Application for a Writ of Habeas Corpus by BERNARD W. SMITH	No. 199 Habeas Corpus

Opinion and Order of Court—August 7, 1945

This habeas corpus proceeding is instituted by Bernard W. Smith, a military prisoner at the United States Peni-

tentiary, Lewisburg, Pennsylvania, who was convicted by a General Court-Martial on two charges involving violations of the 92nd and 93rd Articles of War.[1] The first involved the carnal knowledge of one Sheila Winifred Dale, a British girl, twenty years of age, on July 11, 1944; the second charge involved an assault with intent to commit rape upon one Miriam Florence Cullum, a British girl, nineteen years of age, on the same date and within a period of less than one-half hour prior to the offense set forth in the first degree. Both violations occurring in the same general vicinity on what is known as Ipswich-Manning Tree Road, Lawford, Essex, England.

302 Petitioner has alleged numerous errors which he seeks to set up as denials of due process. All the matters raised by him may be summarized in four basic contentions as follows:

1. That the trial court under the evidence should have found him "not guilty".
2. Incompetency of Counsel.
3. That the pre-trial investigation under Article of War 70 was conducted in such a manner as to deprive the General Court-Martial of jurisdiction of the petitioner.
4. That matters occurring in the course of the trial including the improper admission of evidence and the unexplained absence of a witness deprived the Court of jurisdiction and rendered his conviction void.

Counsel for the petitioner sought in this proceeding to review the entire testimony had before the trial court, to point out discrepancies between the testimony of witnesses for the prosecution and the defense and (on the basis of his contention that the trial court should have believed all of the witnesses for the defense and not the witnesses for

[1] "CHARGE I: Violation of the 92nd Article of War.

"Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July 1944 forcibly and feloniously, against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages Station Road, Lawford, Essex.

"CHARGE II: Violation of the 93rd Article of War.

"Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz., rape, commit an assault upon Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot."

the prosecution) now contends that the trial court erred in finding the petitioner Smith guilty. There was no proof of any deliberate deception or suppression of evidence by the prosecution. Smith's position here is that the prosecution witnesses should have been disbelieved, that his witnesses as to alibi should all have been believed and that on that basis he should have been acquitted and that this Court should not hold that the prosecution's witnesses were not telling the truth.

Whether or not a witness in the trial of a case committed perjury is not in and of itself the basis for habeas corpus.[2]

303 It was for the trial court to decide whether it would believe or disbelieve certain testimony and to determine what weight it would give to any portion of the evidence. It is not the function of this Court in a habeas corpus proceeding to reevaluate the evidence from the cold record, without the benefit of seeing and hearing the witnesses, and to decide whether or not it would have disagreed with the findings of the trial court. The Supreme Court has always recognized that this is not a function of the Court in a habeas corpus proceeding and only recently in connection with a habeas corpus involving a military trial has reaffirmed this principle.[3]

However, by reason of the other matters raised by petitioner, we have carefully reviewed the entire Court-Martial record. Miriam Cullum testified to facts which showed a rather brutal assault with the expressed intention of committing rape. Its culmination was only prevented by the timely arrival of one Carter, a British Corporal, and a civilian. They found her on the ground, crying, and in a shaken nervous condition. Her legs were bruised and her neck was bruised and swollen for several days. The time was fixed at approximate 11:00 o'clock P. M. Sheila Dale, the other victim, testified to being dragged and thrown to

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[2] Hodge v. Huff, (C. A. D. C.) 140 F. 2d 680, cert. den. 322 U. S. 733; Long v. Benson, (CCA 6) 140 Fed. 2d 195.

[3] The Supreme Court *In Re* Yamashita 327 U. S. 1, 8, 66 S. Ct. 340, 343, said "We also emphasized in *Ex parte* Quirin, (317 U. S. 1, 63 S. Ct. 2, 87 L. Ed. 3) as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioner. * * * The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. * * *"

the ground and attacked. She arrived home in a hysterical condition. An American soldier who was visiting in a nearby house, was called and testified to her condition, that her blouse was open, and that there were dirt marks on her clothing. There was medical testimony that her right thigh, left arm and left knee were bruised. Each girl, independently, and without any information from the other, gave descriptions of their attacker which tallied closely with Smith's appearance.[4] At a line-up of twenty soldiers a week or so later each girl was separately taken from a room to walk past the line-up and without any assistance from the other, immediately and unhesitatingly pointed out Smith as the attacker. They again positively identified him at the trial. The last attack occurred about five miles from the Post. The time of the attack was necessarily an approximation and estimated as being around 11:30 to 11:45 o'clock P. M. The defense was an alibi that Smith had reached the Post at 11:30 o'clock P. M. But the testimony of his witnesses as to time also consisted of approximations which may be best exemplified by that of a soldier named Pagtyka who was joined by Smith on the way back to the Post. He had been at various "pubs", the last one being the "Bucks Horn", "loafing around and drinking"[4] and was "feeling high".[5] On direct examination he testified that he was there until 10:00 o'clock drinking beer with a few girls, then went on his cycle with one of the girls to the first bridge, and stayed about fifteen to twenty minutes and then went home. Also as to the time of leaving he stated "It was a little after 10 because I took a little time finishing my beer." That he left this girl "about 25 after ten" and "Then I was on my way home and then met up with Smith" on his cycle about three quarters of a mile farther on. They stopped on the way and had a smoke "about five minutes" and reached the gate "near 11:30". He also stated that he met Smith "about 25 minutes after 10", then after being reminded of the three quarters of a mile traveled after leaving the girl he estimated the time at "about a quarter to 11." On cross-examination he estimated the time with the girl at "about 20 minutes" and that it could have been longer and finally that it could have been close to midnight when he reached the Post. On examination by the court he fixed the time of getting his last beer at 10:00 o'clock because the woman at the "Bucks Horn" called

[4] Court-Martial Record page 187 (Trial Testimony page 124).
[5] Court-Martial Record page 189 (Trial Testimony page 126).

"Time." He admitted he did not look at a clock, and also that he did not know whether this particular "Pub" closed at 10 or 10:30. Significant was his statement that Smith told him "* * * he had a girl that night", although Smith in his testimony said he had visited a number of "Pubs", that he was drinking, but made no mention whatsoever of being with a girl.

Of Partyka's testimony Counsel for petitioner naively comments, "He met the petitioner on the way back to camp that night at 10:45; at that time he was bicycling up the hill; Partyka caught up with him and rode into camp with him. Other than a short stop for a smoke they continued to the camp without stopping and came in Gate 2 and reached that gate at 11:30" * and states further, "We find Smith's entrance into camp, at about 11:30, corroborated by Partyka. * * *"

Certainly, there are few records which when searched with a fine tooth comb will not yield some debatable rulings of law or admission of evidence and if this could be done in habeas corpus there would be no end to litigation and the time of the courts would be occupied in useless and futile speculation. The pronouncement of the Supreme Court in Glasgow v. Moyer, 225 U. S. 420, 429; 56 L. Ed. 1147; 32 S. Ct. 753, that "* * * The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact."

306 is still a salutary rule. Certainly here the eight members of the trial court with the benefit of observation of the witnesses were in a better position than this court to arrive at the correct result. Moreover, on the record before us, there would be no inclination to disagree with the verdict at which they arrived. The trial record shows a careful impartial trial, and the Board of Review made an exhaustive and careful study of both the law and the facts of the trial.

We are next concerned with the usual allegation of competency of assigned counsel, the petitioner alleging that he did not have adequate representation. Military Law is due process of law to those in the military or naval service and for proceedings before Courts-Martial a commissioned officer is competent counsel.

* Page 3 of Petitioner's Brief
† *Ex parte* Benton (D. C. Cal. 1945) 63 F. Supp. 808
‡ Altmayer v. Santgrad (CCA 5) 148 F. 2d 161

The special orders dated August 9, 1944, designating the members of the court in petitioner's case, also appointed for him a defense counsel and assistant defense counsel.[3] In addition the record[4] shows that Smith was given an opportunity to introduce civil or military counsel of his own selection and accordingly did introduce as Associate Counsel one 2nd Lt. Harry Lieberman, although electing to also retain the services of the appointed Defense Counsel and Assistant Defense Counsel.[5] Lieber-307 man, the selected counsel, was a law school graduate with ten years experience in the practice of law.[6] The appointed Assistant Counsel was "* * * a graduate of Notre Dame Law School and admitted to practice in Washington."[7] Whether or not the other appointed Counsel was an attorney does not appear. Whether any of the specific guarantees of the 5th and 6th amendments relating to criminal prosecutions apply to petitioner in military trial[8] need not be decided here since the remaining questions may be fully disposed of, giving the petitioner the benefit of the principles as applied to criminal prosecution in the Civil Courts. That he had counsel of his own choosing might well dispose of this question, but the reflection cast upon counsel, including appointed counsel calls for consideration. The burden of proving such incompetency is upon petitioner.[9] He has introduced no evidence other than the trial record and his own lay conclusion. Even had the record shown carelessness of counsel or a failure of counsel to object to the introduction of evidence, or errors in their advice, it would not rise to that plane where it would constitute a ground for habeas corpus.[10] Nor does

[3] Special Order No. 105, dated August 9, 1944, (Page 64 of the Court Martial Record) appointed Captain William Kajelman as Assistant Defense Counsel and 1st Lt. Frederick M. Crollard, Jr. as Assistant Defense Counsel. This procedure was in accord with the requirements of Article of War 11 (U. S. C. A. 1482).

[4] Page 66 of Court-Martial Record.

[5] Page 66 of Court Martial Record. The Trial Court's preliminary action complied with Article of War 17 (10 U. S. C. A. 1488).

[6] Respondent's Exhibit No. 2.

[7] Transcript of Testimony page 42.

[8] See discussion *Ex parte* Bestoge, *Supra*.

[9] Walker v. Johnston, 312 U. S. 275, Bostic v. Rives, 107 F. 2d 649, cert. den. 309 U. S. 664, Boehman v. Green, 130 F. 2d 804, Achtien v. Dowd, 117 F. 2d 989.

[10] Diggs v. Welsh (U. S. App. D. C.) 148 F. 2d 667, Dorsey v. Gill, (App. D. C.) 148 F. 2d 857, para. 49—Andrews v. Robertson (C. C. A. 5) 145 F. 2d 101, cert. den. 65 S. Ct. 1013, 324 U. S. 871.

the Constitution guarantee the assistance of the most brilliant counsel. To entitle petitioner to relief on this
308 ground there must be such a neglect of duty . . .
as to make the trial itself 'offend those canons of decency' which constitute due process of law.",[18] or an extreme case which would make the proceedings "a farce and a mockery of justice."[19]

Petitioner's counsel, with the benefit of having before him the typewritten copy of the entire testimony, and with an opportunity to carefully analyze the same, and with a knowledge of the very last witness's testimony, points out instances where he, had he been trying the case, would have put some additional questions to some of the witnesses, or objected to some of the testimony. Counsel in the actual trial of a case and with a background of information not appearing in the record, may well, in the exercise of good judgment, deem it wise to refrain from asking certain specific questions or refrain from objecting.[20] Moreover, an examination of the trial record convinces this Court that the petitioner was most ably, competently, and vigorously represented and defended.

Petitioner alleges that the investigation under Article of War 70 (10 U.S.C.A. 1542) was conducted in such a manner as to deprive the General Court-Martial of jurisdiction. Petitioner's position is that the requirements of Article of War 70 are all jurisdictional and any deviation would *per se* render any subsequent proceedings void.

It has been aptly said that "It was no part of the purpose of the authors of Article of War 70 to prevent the trial,
309 conviction and punishment of a guilty man."[21] and Article of War 37 (10 U.S.C.A. 1508)[22] as a guide for reviewing and confirming authorities provides as to Courts-Martial that errors complained of must have "injuriously affected the substantial rights of an accused"

[18] U.S. *Ex Rel* Mitchell v. Thompson (D.C. N.Y.) 56 Fed. Supp. 683

[19] Strong v. Hunt (C.C.A. 10th) 148 F. 2d 692

[20] Diggs v. Welch, *supra*

[21] Bostic v. Rives, *supra*

[22] Court-Martial 290477, Lloyd (1943) 17 Board of Review 153, 159

[22] Article of War 37 (10 U.S.C.A. 1508) provides: "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless, in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused . . ."

Petitioner alleges that Lt. Todd was "the originator of the charges and the accuser in fact," and "ineligible to be the impartial investigator under the 70th Article of War."

The formal charges were preferred by Captain MacGregor, the accused's immediate Commanding Officer.[23] The attacks had been reported to the British Police and they had conducted a preliminary investigation and interviewed witnesses with the assistance of several agents assigned by the Criminal Investigation Division, U. S. Army.[24] Lt. Todd as Provost Marshal of the Army Base or "Field", first knew about the matter between the 16th and 18th of July, when visited by two British Constables,[25] and made available to them the lists of names to locate soldiers who had been in that vicinity, including a "fellow by the name of Smith." He called in some suspects, including
310 Smith, for interviews.[26] The British Constable examined Smith's hand for tooth marks.[27] Subsequently Lt. Todd participated in arranging a line-up of fourteen soldiers, to ascertain whether the girls identified any suspect, including Smith.[28] Whether Lt. Todd participated as Provost Marshal prior to or as investigator subsequent to his designation is immaterial. It was a proper part of an impartial investigation.[29] The Record shows that as Investigation Officer, Lt. Todd advised Smith of his rights, informed him of the statements of witnesses, called every witness Smith requested, permitted Smith to interrogate any witnesses he desired, and conducted a fair and impartial investigation under Article of War 70.[30] This

[23] Court-Martial Record pages 32 to 34.

[24] Report of C. I. D. in Court-Martial Record, pages 38 to 40.

[25] Transcript of Testimony, page 36.

[26] Transcript of Testimony, page 37.

[27] Transcript of Testimony, page 93.

[28] Transcript of Testimony, pages 37 and 38.

[29] It also appears that Smith consented to the line-up; Lt. Todd's Testimony, Transcript of Testimony, pages 38 and 39; Smith's Testimony, Transcript of Testimony, page 32.

[30] Court Martial Record, pages 42 to 54.

While the Court-Martial Record cannot be collaterally attacked—Givens v. Zerbst, 255 U. S. 11, Ridlle v. Dyche, 262 U. S. 333, 43 S. Ct. 555, L. Ed. 1069; Hill v. U. S. *Ex. Rel.* Wampler, 298 U. S. 460, 56 S. Ct. 760, 80 L. Ed. 1283; Smith v. Hiatt, (D. C. M. D. Pa. 1944) 54 Fed. Supp. 481; Spann v. Zerbst, (CCA 5) 99 F. 2d 330; Farnsworth v. Zerbst, (CCA 5) 98 F. 2d 541, there was not in any event any evidence before this Court which would have justified any contrary conclusion. After hearing and seeing the witnesses this Court would accept Lt. Todd's testimony on this matter. Neither does Hellinger's testimony negative it.

was all that Smith had a right to ask. He was not deprived of any substantial right.[31] At the opening
311 of the trial he was also given full opportunity to object to proceeding with the trial.[32]

Petitioner contends that the line-up at which he was identified was unfairly conducted,[33] and that the British Constable at his interview had no right to look at his hand for tooth marks, and that these matters constituted compulsory self-incrimination.[34]

312 Petitioner proceeds on the theory of an involuntary confession. The girls at the trial again positively identified him, and his hand was available for examination at the trial. Consequently, even though consider-

[31] Smith was even given a neuro-psychiatric examination before the charges were referred for trial. Court-Martial Record, page 30.

Counsel for accused requested and was granted a ten day continuance to prepare for trial. Court-Martial Record, page 31.

[32] At the opening of the trial the following colloquy took place (Court-Martial Record, page 67):

"Law Member: Private Smith, you understand you are charged with a serious offense, involving a possible death penalty. Have you had ample time to confer with your Defense Counsel and with Lt. Liberman?

"Accused: Yes, sir.

"Law Member: You are satisfied to proceed with the trial at this time?

"Accused: Yes, sir.

"Law Member: You are satisfied you have had sufficient time to confer with your counsel to sufficiently try your case?

"Accused: Yes, sir."

[33] Petitioner's allegations were not substantiated by any facts, but were inferences which he sought to adduce. The line-up was conducted with his Commanding Officer present to protect his rights and with (among others) the Chaplain of the Field, the Executive Officer of the Field, and two British Police Officers as witnesses. (Court-Martial Record, page 39, and Transcript of Testimony, page 38.) The girls were kept in Lt. Todd's office in the Guard House, which opened onto the Parade Field, they were taken out one at a time, and the window of which petitioner complained had opaque panes (Transcript of Testimony, page 38). There was not a scintilla of evidence that either girl watched the other while outside. Petitioner's allegations might well be termed his unsupported imaginings.

[34] Petitioner referred to Article of War 24 (10 U. S. C. A. 1495) which is: "No witness before a military court, commission, court of inquiry, or board or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board or before any officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."

ed as an involuntary confession, it did not prevent such identification at the trial.[35] Nor is the question of the admission thereof at the trial a proper subject of habeas corpus.[36] Moreover, fundamentally, such identification or physical examination is not within the doctrine of self crimination or involuntary confesion.[37] Physical inspection "does not call upon the accused as a witness, i. e., upon his testimonial responsibility."[38]

Petitioner further objects to the fact that a "Mrs. Kerry" was not called as a witness, evidently under the theory of denial of compulsory process. The prosecution "is not under a duty to place upon the witness stand every person who may have some knowledge of the crime which is the subject of the trial."[39] Nor is it bound to call any specific persons as witnesses,[40] and, where application is to the Courts for compulsory process for wit-
313 nesses to be produced at government expense, exercise of discretion by the trial court[41] is involved[42] which ordinarily would not be disturbed in a habeas corpus proceeding,[43] it must also appear that the witness if called would have been favorable to the accused.[44] This is true even where the question is raised on appeal as distinguished from a collateral proceeding.[45] The mere fact that a witness was not present or was not called is not in itself sufficient to constitute a denial of Compulsory Process.[46]

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[35] U. S. v. Bayer, U. S. Supreme Court, Slip opinion June 9, 1947, page 8.

[36] Miller v. Hiatt (CCA 3) 141 F. 2d 690; Eury v. Huff (U. S. App. D. C.) 146 F. 2d 17; Clarke v. Huff (U. S. C. A. D. C.) 119 F. 2d 204.

[37] Wigmore points out the distinction between these two commonly confused terms, Wigmore on Evidence, Vol. 8, paragraph 2266.

[38] Wigmore on Evidence, Vol. 8, paragraph 2265.

[39] Curtis v. Rives (U. S. C. A. D. C. 1941) 123 F. 2d 936, 940.

[40] Aycock v. U. S. (CCA 9) 62 F. 2d 612, cert. den. 53 S. Ct. 595, 289 U. S. 734, 77 L. Ed. 1482.

[41] In military procedure the decision is by the appointing authority before trial and the Court after trial commences. Manual for Courts-Martial, United States, Army, 1928, (corrected to April 20, 1943), paragraph 97, page 86.

[42] Casebeer v. Hudspeth (CCA 10) 121 Fed. 2d 914, para. 6-7, Cert. den. 314 U. S. 683, reh. den. 63 S. Ct. 23, 317 U. S. 704, 87 L. Ed. 562; Gates v. U. S. (CCA 10) 122 F. 2d 571, Cert. den. 62 S. Ct. 478, 314 U. S. 698, 86 L. Ed. 558; Nguield v. U. S. (C. A. D. C.) 118 F. 2d 375, Cert. den. Ruben v. U. S. 62 S. Ct. 580, 315 U. S. 798, 86 L. Ed. 1199.

[43] Fitzgerald v. Sanford (CCA 5) 142 F. 2d 445.

[44] Smith v. Squier (CCA 9) 1943) 136 F. 2d 536, Cert. den. 64 S. Ct. 85, 320 U. S. 774, 88 L. Ed. 464.

[45] Robinson v. U. S. (C. A. D. C. 1942) 128 F. 2d 322.

[46] Curtis v. Rives, *supra*.

Mrs. Kerry was with Miriam Cullum when Smith first accosted her. Petitioner contends she had made a statement in which she said "If I were in Court I would identify him" and that such statement was offered in evidence by the prosecution but ruled out and stricken from the record.[8] The Court-Martial Record does not show this
314 witness requested by Smith, and he admits that no request was made of the Trial Court.[9] Lt. Todd, confirming the Court-Martial Record, testified that he called every witness requested by Smith and he had a full opportunity to interrogate them.[10] As to Mrs. Kerry, Smith was fully aware that her name had appeared in the case, but he did not desire her as a witness.[11] Had he been so positive of his own innocence it would seem that he would have been eager to interview her. Not only, therefore, has he failed to present a question for consideration in habeas corpus but it is difficult to conceive how his rights as to witnesses could have been more carefully and fairly protected.

315 With reference to petitioner's contention that we must assume that the Court was influenced thereby, it is sufficient to say that even if such a statement of Mrs.

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[8] Transcript of Testimony, page 25.

We do not find this substantiated by the Court-Martial Record but in any event petitioner does not thereby show a favorable witness.

[9] Transcript of Testimony, page 33:

"Q. Did you request the Court itself to have Mrs. Kerry produced as a witness?

"A. No, sir."

[10] Transcript of Testimony, page 41:

"Q. Did you comply with his request and call the witnesses he requested you to call?

"A. I called every one of them.

"Q. Did you examine them?

"A. Yes, sir.

"Q. Did he examine them?

"A. Yes, sir.

"Q. Were their statements reduced to writing?

"A. They were."

[11] Lt. Todd testified (Transcript of Testimony, page 42):

"A. So far as from a prosecution standpoint it was not necessary. As far as from the Defense Standpoint, I asked Smith if he wanted her, and he said 'NO.'"

Smith himself said (Transcript of Testimony, page 17):

"* * * He asked me if I wanted to see her. I didn't know exactly whether I did or not. * * *"

Kerry was offered and refused, we do not understand it to be the law that we must presume that the Court did not perform its duty[3] in disregarding it, just as it would have instructed a jury to do.

The petition for the writ is accordingly denied and the rule to show cause dismissed.

FREDERICK V. FOLLMER,
United States District Judge.

August 7, 1947.

316 United States District Court
for the Middle District of Pennsylvania

(TITLE OMITTED)

Notice of Appeal—Filed Sept. 8, 1947

SIRS:

PLEASE TAKE NOTICE that the petitioner herein, BERNARD W. SMITH hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from an order of Honorable Frederick V. Follmer, United States District Judge for the United States District Court for the Middle District of Pennsylvania, dated August 7, 1947, denying an application for a writ of habeas corpus and dismissing a rule to show cause in the above entitled action.

The petitioner hereby appeals from each and every part of said order and decision.

Judgment herein was entered with the Clerk of the United States District Court for the Middle District of Pennsylvania August 7, 1947.

Dated: September 2, 1947.

BERNARD W. SMITH,
Petitioner.

DANIEL F. MATHEWS,
913-919 University Bldg.,
Syracuse, New York.
FRANK J. McDONNELL,
403-405 Lincoln Trust Bldg.,
Scranton 3, Pennsylvania,
Attorneys for Petitioner.

TO:

CLERK OF DISTRICT COURT OF THE U. S. MIDDLE DISTRICT OF PENNSYLVANIA.

[3] Neufield v. U. S. *Supra*

ARTHUR A. MAGUIRE, ESQ.,
Asst. U. S. Attorney.

MAJOR THAYER CHAPMAN, JAG,
Washington, D. C.

318 In The District Court of the United States
For the Middle Distfict of Pennsylvania

(Title Omitted)

Order of Court As to Record—Filed Dec. 10, 1947

Now to wit, December 10, 1947, it appearing that it would be expedient to have copies of the record prepared in connection with the pending appeal, and that the entire original record should in any event be available for inspection by the Circuit Court of Appeals in said appeal; the Clerk of this court is therefore, in accordance with Rule 5(1) App. of the Rules of the United States Circuit Court of Appeals for the Third Circuit, directed to transmit the original Clerk's office files including the exhibits to the Clerk of the Circuit Court of Appeals in lieu of copies thereof.

FREDERICK V. FOELLMER,
U. S. District Judge.

No. 9509.

319 United States Circuit Court of Appeals for the
Third Circuit

In the Matter of the Application
of
BERNARD W. SMITH
for a Writ of Habeas Corpus

Order Granting Leave to Proceed in Forma Pauperis—Oct. 24, 1947.

PRESENT: BIGGS AND GOODRICH, *Circuit Judges.*

Upon consideration of the petition and affidavit of Bernard W. Smith,

It is hereby ORDERED that petitioner's appeal be docketed in this court without prepayment of costs, and that said petitioner be permitted to proceed in this court in *forma pauperis*.

By the Court,
BIGGS,
Circuit Judge.

October 24, 1947.

330 United States Court of Appeals
For the Third Circuit.

No. 9509. October Term, 1947.

BERNARD W. SMITH,
Petitioner-Appellant,

v.

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA,
Respondent-Appellee.

Appeal From the District Court of the United States For the Middle District of Pennsylvania.

Argued April 8, 1948.

Before GOODRICH, McLAUGHLIN AND O'CONNELL,
Circuit Judges.

Opinion of the Court—Filed September 14, 1948.

By McLAUGHLIN, *Circuit Judge.*

In 1944, while based in England, appellant, then a private in our Air Corps, was convicted of rape and attempted rape by a general court-martial. His sentence of life imprisonment was later reduced to sixteen years. He appeals from the dismissal of his petition for habeas corpus by the District Court.

Both offenses were alleged to have been committed between 10:30 and 11:45 on the night of July 11, 1944, in the same area, which was about five miles distant from his particular base. Appellant claimed that on that evening he had bicycled by himself to public houses in nearby towns, had drunk some beer, and was back in camp
331 well before midnight. Miriam Cullum, the attempted rape complaining witness, testified that she was returning to her home that night about half past ten, walking along with a Mrs. Kerry and wheeling her bicycle beside her. An American soldier passing by asked to accompany them home. Mrs. Kerry said "No." Miss Cullum said nothing. The soldier went with them. Mrs. Kerry left them at her house. Miss Cullum went off on her bicycle. The soldier went with her or followed her. She says he then forced her off her wheel and attempted to rape her. Some people came along and the soldier rode away on his bicycle. Miss Cullum says she told her parents what had happened.

The second girl, Miss Dale, stated that she was on her way home about 11:45. She, too, was on a bicycle. She said an American soldier rode up to her on a bicycle and forced her off it. As some other soldiers passed she remounted and rode towards her home with the soldier riding beside her. A little later he pushed her from her wheel and after a struggle had intercourse with her. Miss Dale wore glasses. These were not dislodged in the melee. She, too, told her family of the occurrence. Neither the girls nor their families notified the police. It was Miss Dale's going to a doctor in fear of pregnancy, with the doctor advising the authorities, that brought on an official investigation.[1] Since the girls said an American soldier was involved in each instance, our army, through enlisted men of its Criminal Investigation Division, investigated them in conjunction with the local police. Meanwhile, the Provost Marshal, Lieutenant Todd, was interviewing suspects, among whom was appellant. The latter was questioned for two hours by Todd and held for an identification line-up which was consented to by him and his unit commander.

At the line-up the girls identified Smith. He contends that the line-up was unfair; that indications were given by the military police of his identity. We cannot, of course, here weigh the evidence as to that, but it is to be noted that the officer in charge was Lieutenant Todd. Todd returned Smith to his cell after the line-up and then would seem to have interviewed the girls that same evening. Exhibit B for the defense referred to at the trial as "Statement of Sheila Dale to Lieutenant Todd" appears to be the record of such an interview. Todd signed these as true copies. Illustrating Todd's connections with the interviews, on page 4 of Exhibit B at the end of Miss Dale's statement and just under her typed signature, appears the following:

"Original statements in the pocket book of P. C. 305 Felton, Pages Nos. 142-149, and 141, taken at 10:30 A. M. 12.7.44. at Dr. Beckett's Surgery, Main-

[1] The doctor examined Miss Dale about ten o'clock the morning following the occurrence. She had some bruises on the right thigh, left arm, left knee and a graze on the left knee. She was not *virgo intacta*. There was no evidence of injury in the vagina at all. A local witness testified that Miss Dale had a bad reputation for chastity. Admittedly she had been out with another soldier that evening. That soldier was not present or accounted for at the trial.

ningtree, and at 7:45 P. M. 18.7.44. at Raydon Aerodrome, respectively.

Certified True Copy
E. W. Shepherd.
Detective Sergeant.

A True Copy
Alan B. Todd
Alan B. Todd,
1st Lt. Inf."

A similar note follows the copy of Miss Cullum's statement. These point to close cooperation between Todd, chief of the Military Police, and the civilian constables. The government's brief emphasizes the later promotion of Lieutenant Todd to captain, which would merely confirm the impression that he was a zealous policeman. Exhibit B is not explained by the government. Its repetition of Todd's bald denial of seeing any witnesses until after his appointment as investigating officer hardly overcomes the implications in the photostat record.

333 As a result of the C. I. D. investigation and the interview and line-up conducted by Todd, charges were filed against Smith with a recommendation for general court-martial. Todd was appointed to conduct the thorough and impartial investigation called for by Article of War 70, 10 U. S. C. Section 1542, which reads in part:

"No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides."

Section 35a of Manual for Courts-Martial, U. S. Army, 1928 (corrected to April 20, 1943), repeats the statutory provisions and the requirements of impartiality. Cf. War De-

partment Technical Manual 27-255, "Military Justice Procedure" (1945), p. 37; Report of Secretary of War's Advisory Committee on Military Justice (1946), Section III E.

Todd's formal report reiterated what he had previously known plus some new matter from Miss Dale's sister and an American soldier who saw Miss Dale shortly after the offense. It also included statements by soldiers who said they saw Smith at the base five miles away from the crime scene within the critical time. Todd recommended a general court-martial.

334. The government asserts that, as he testified at the habeas corpus hearing, Todd had a completely open mind and was seeking only the facts. Unfortunately, as his testimony clearly shows, he considered the full facts unnecessary. He was asked why he had not examined Mrs. Kerry, the one person actually named in the investigation outside of the complaining witnesses who had seen the offending soldier closely. He answered, "So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I asked Smith if he wanted her and he said, 'No'."[2] Such reply cannot be said to account satisfactorily for the elimination, without at least reasonable inquiry, of this vital witness. Todd's attitude, as he himself explains it, is interesting. Under AW 70 and in common fairness to Smith, the investigation had to be thorough and impartial. Its purpose was not only to present the prosecution with a case that would support conviction, but to put before the court-martial authority at least a substantial picture of what had happened, based on all essential evidence. This was not done.

After Lieutenant Todd's investigation was reviewed by the Staff Judge Advocate, a general court-martial was designated. Appellant asserts he was denied counsel. He was represented by an Air Corps officer who was not a lawyer. Two officers who were lawyers were also part of his representation, but he says they did not actively participate in his defense. We find no merit in this point raised. Johnson v. Zerbst, 304 U. S. 458, is cited but has no application. Articles 11 and 17 of the Articles of War control. Under them the general court-martial had the power to ap-

[2] According to Miss Culligan, while she and Mrs. Kerry were walking and the soldier in question was cycling beside them, two special constables then passed going up the hill and the soldier said "good night" to them. Those constables, apparently readily available, were never examined or called as

point, as it did, defense counsel subject to the right of the accused to select his own as provided. There is no requirement that either defense counsel or trial judge advocate be lawyers. Romero v. Squier, 133 F. 2d 528; Altmayer v. Sanford, 148 F. 2d 161. And a study of the record reveals no abuse of discretion by the court-martial authority in the defense counsel appointments made.

335

But Lieutenant Todd's participation in the court-martial as assistant trial judge advocate is a matter of further serious concern. Todd as provost marshal had been in active charge of the investigation which resulted in Smith's being held. Todd then took over as the impartial investigator. There was nothing of any consequence added to the case against Smith during this period. Because of Todd's report and recommendation as investigator a general court-martial was convened, Smith tried before it for most serious offenses, and Todd, a lawyer, was one of the two members of the prosecution staff in court. The transcript does not reveal him as actually examining, but with the case prepared by him from the beginning it is reasonable to assume that he was of considerable pre-trial and trial assistance to the trial judge advocate.

The review of the trial record by the staff judge advocate fails to comment on the failure to interrogate Mrs. Kerry or the special constables. It makes no mention that Provost Marshal Todd, responsible for Smith's arrest, was the impartial investigator whose report and recommendation resulted in the general court-martial in which he also took part as one of the two trial judge advocates.

On this habeas corpus appeal we cannot deal with alleged trial errors nor can we weigh the evidence. The only issue is the legality of the commitment of the appellant and the particular question before us is whether the court-martial had jurisdiction in view of the pre-trial investigation which was conducted. The government asserts that compliance with AW 70 is not a pre-requisite to the acquisition of jurisdiction by a general court-martial. In support of this it cites two cases where officers were tried by general courts. The courts included officers junior in rank to the accused, contrary to the Articles of War.

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This was held not to be a jurisdictional defect. The third reference is to a court having fewer than the maximum number of officers but more than the minimum

[1] Ex parte Quirin, 317 U. S. 1. In re Yamashita, 327 U. S. 1.

required.' The relevance of these decisions is not perceived.

It is then urged that the viewpoint of the 79th Congress as expressed in House Report No. 2722, on Resolution 291, was that the requirements of Article 70 enacted in 1920 were not mandatory. It is said that the report of the 80th Congress, House Report 1034, with respect to the bill amending the Articles of War which recently became law, is in accord with this. That report states that an investigation should precede every general court-martial trial, "but * * *" should be considered sufficient if it has substantially protected the rights of the accused." It should not, the report continues, be such as to "subject *every* * * * case to reversal for jurisdictional error on purely technical grounds." (Emphasis added.) While the thought of the current Congress as to 1920 legislation is not a judicial precedent, that thought tends to corroborate the jurisdictional nature of the error of which complaint is made.

Waite v. Overlade, 7 Cir., 164 F. 2d 722, is cited by the government for the proposition that the mandate of AW 70 is merely directory. In that case there is no indication wherein the pre-trial investigation was defective—the court simply states that it was alleged that "*proper* procedures had not been followed with respect to pre-trial investigation." And the opinion goes on to say at page 724: "If there was any relaxation of pre-trial investigation requirements not waived by appellant (and we are not convinced that there was), *it certainly was not of a nature seriously to impair any of his fundamental constitutional rights.*" (Emphasis added). In the present matter we are not faced by some necessary informality of investi-
337 gation but by the lack of its two essentials, thoroughness and impartiality. We said in United States v. Hiatt, 3 Cir., 141 F. 2d 664, 666, that "due process as applied to members of the military forces means "the application of the procedure of the military law. * * * But the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way." Judge Biggs sitting in the district court in Hicks v. Hiatt, D. C. M. D. Pa., 64 F. Supp. 238, 249, with particular reference to the accused soldier preparing his defense, said, "The petitioner was not given the benefit

'Swain v. United States, 165 U. S. 553; Mullan v. United States, 140 U. S. 240; Martin v. Mott, 25 U. S. 19.

of the procedure of the military law in this regard. This was a denial of due process of law to him." In a quite similar situation to the instant one where Todd is the real accuser, later impartial investigator, and finally assistant trial judge advocate, Judge Ryan in an exhaustive, well considered opinion on the subject holds: "It cannot be fairly said that an accused has suffered no injury or harm and that a purely technical wrong has been committed, which does no harm, when the one who in fact the accuser is appointed to conduct a thorough and impartial investigation. Especially is this not so, when the accuser functions, not only as the investigator, but later appears in the trial as a witness for the prosecution and gives material, vital and damaging testimony concerning the accused and evidence of an admission allegedly made by the accused to him." Henry v. Hodges, D. C. S. D. N. Y., 76 F. Supp. 968, 973.

The government stresses the recent decisions of the Judge Advocate General which maintain that the pertinent provisions of Article 70 are directory in effect. However, in the Digest of Opinions of the Judge Advocate General of the Army (1912-1940), at page 292 appears the following:

> "A record of trial showed affirmatively that no investigation of the charges had been made prior to
> 338 the trial. Held that the provisions of Article of War 70, 41 Stat. 739 [10 U. S. C. A. Section 1542], with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can legally be referred to trial. A court martial is without jurisdiction to try an accused upon charges referred to it for trial without having been first investigated in substantial compliance with the provisions of Articles of War 70, and in such a case the court martial proceedings are void ab initio."

Largely relying on the above, in Reilly v. Pescor, 8 Cir., 156 F. 2d 632, 635, the court said regarding a charge which had not been investigated in accordance with Article 70, "We therefore may concede without deciding that the Court-Martial was without jurisdiction to try the added charge of uttering a forged document."

CM 209477 Flood, 17 BR 149, 153; CM ETO 6694 Yarneck, 17 BR (ETO) 163, 179; CM (ETO) 4570 Haskins, 13 BR (ETO) 57, 71-75; GM 32348 Ruckman

In Anthony v. Hunter, D. C. Kansas, 71 F. Supp. 822, a major reason for sustaining the application for habeas corpus was that witnesses in behalf of the accused soldier, though available and named with a request that they be produced "were not produced at the Pre-trial Investigation or at the trial before the General Court Martial." And in the circumstances the court held that "Relief should be granted by a court of general jurisdiction, charged with the responsibility of inquiring into the legality of the detention of the accused."

As Judge Biggs said in Hicks v. Hiatt (supra), "The petitioner's conduct may well have been such as to bring disgrace upon the armed services." But "This fact may not be taken into consideration since the judgment of this court must be in accordance with law." The conversion of the provost marshal, who was the real accuser and arresting officer, into the investigator under Article 70 and then, following his recommendation for a general court-martial, his functioning as assistant trial judge advocate, was unjust to the accused. It did not substantially comply with AW 70. It did not give Smith the statutory protection guaranteed him as a soldier. The ignoring of Mrs. Kerry and the special constables though available and essential cannot be accepted as fulfilling the specific requirements for the investigation. We recognize the enormous exigencies of the then general conditions, but we cannot permit them to serve as an excuse for the failure to give the soldier involved the express safeguards with which Congress provided him.

The judgment of the District Court will be reversed and the cause remanded with directions that the appellant be discharged from custody.

GOODRICH, *Circuit Judge*, dissenting.

For the purpose of this dissent it will be assumed that compliance with Article of War 70 conditions the jurisdiction of a general court-martial, though the proposition is

[1] It will be remembered that there is no claim that defense counsel were ever asked whether they wished Mrs. Kerry produced as a witness. Paragraph 70d, as previously mentioned, did not require habeas corpus hearing that he asked Smith if he wished to have her as a witness. Smith at the same hearing testified that he asked his defense counsel for her presence as a defense witness during the course of the trial.

open to grave doubt.[1] But with this assumption there seems no adequate basis for rejecting the Trial Court's conclusion that the requirements of that Article were complied with and that a thorough and impartial investigation was made prior to the appellant's trial. Such a conclusion is one of fact not law and when made by a District Judge should be allowed to stand unless we think it clearly wrong, and, of course, this is especially true where he, and not we, have had the benefit of the presence of witnesses giving oral testimony. Elaboration of the wording and effect of Rule 32 is unnecessary.

The bases for rejecting the Trial Judge's conclusion here seem inadequate. Quite obviously Lieutenant Todd was not the party offended and had no individual concern in this soldier's prosecution. The record alternatively shows that he busied himself in securing witnesses requested by the petitioner. It seems to me clear that the sum total of his activities at the investigation stage of the case were only matters called for in the performance of his duties as Provost Marshal at this particular air base. For

[1] At least since 1943 the administrative interpretations of such section have been uniformly of the view that it was not jurisdictional. Holding of Board of Review in C. M. 229477, 1 Dig. 17 B. R. 145, 153.6 (decided February 2 1943); Holding of Board of Review in C. M. 323486, Ruckman (1947). The contents of the legislative history cited in the majority's opinion compels the view that Congress apparently agrees with such interpretation and did not at that time desire to change it. Furthermore the opinion of the Judge Advocate General cited in the majority's opinion to the effect that the Article is jurisdictional was superseded by his opinion in the Floyd case. See 57 Yale L. J. 483, 485 (1948). That earlier opinion, moreover, was in a case where the Judge Advocate General had found no pretrial investigation whatsoever. See 57 Yale L. J. supra, 484 f. n. 15.

The authorities relied upon do not persuade such a conclusion. They all rely upon the superseded Judge Advocate General's opinion and are cases in which the irregularities in the pretrial investigations prejudiced the trial itself. Thus in Hicks v. Hiatt, 64 F. Supp. 238 (M. D. Pa. 1946) the refusal of the accused that his pretrial statements would be used against him at the trial, induced statements which were used against him at the trial. Moreover, the matters vital to the accused's defense were not investigated on the mistaken notion that they were incompetent in the consideration of the offense. Anthony v. Hunter, 71 F. Supp. 823 (D. C. Kansas 1947), also relied upon the superseded opinion and the witnesses requested by the accused were not produced at the pretrial investigation of the trial. The only two Circuit Court of Appeals cases which deal at all with the point are as much in favor of the Government as the Petitioner. Wade v. Overlade, 164 F. 2d 732 (C. C. A.

instance, it is said that he took statements from complaining witnesses. If he did, it would seem to me to have no significance in making a conclusion concerning the fairness of his investigation. But his signature on the photostat of those statements is only as an authenticating officer; in other words, he simply certifies certain writing as a true copy of another writing. The statements in fact were taken by a man named Felton, a British police constable. It is true that Lieutenant Todd in cooperation with the British police conducted the line-up in which the girls who claimed to have been attacked identified Smith. The Lieutenant did that because it was part of his official duties. It does not, it is submitted, in the least show any bias against this prisoner. The girls made the identification, not Todd.

341 I cannot follow the reasoning by which it is thought that Lieutenant Todd's participation as an Assistant Trial Judge Advocate at the court-martial showed a lack of fair or thorough investigation. Possibly such previous work as investigator would make it inappropriate for him to sit as a member of a judicial tribunal.[2] But he only acted as counsel and assistant counsel at that. The use of information gained in the investigation, assuming it was made, does not show the investigation was not impartial and objective.

The last point relied on to prove lack of thoroughness in the investigation was the failure to call Mrs. Kerry. There are three answers to this: One is that Smith, himself, did not want her called. The second is that at most she was present only at the first meeting between Smith and the complaining witness in the attempt case. And, third, I submit there is no basis for requiring that an investigation, in order to be thorough and impartial, seek out every person mentioned in connection with the affair under scrutiny, especially after a preliminary statement has been taken indicating the probable content of what such person would have to say.

This is a case where, in my opinion, the conclusion reached by the Trial Judge should stand and it seems to me

[2] But cf. Keyes v. United States, 109 U. S. 336 (1883), in which the validity of a court-martial sentence was upheld by the Supreme Court where the same officer was a complaining witness, a witness, and sat and passed

that we are going beyond our proper function in upsetting it.

A True Copy

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

342 In the United States Circuit Court of Appeals
For the Third Circuit

No. 9509 October Term, 1947

Bernard W. Smith, petitioner-appellant,

v.

William H. Hiatt, Warden United States Penitentiary, Lewisburg, Pennsylvania, respondent-appellee.

Argued April 8, 1948

Before Goodrich, McLaughlin and O'Connell, Circuit Judges.

Judgment—Sept. 14, 1948.

On appeal from the District Court of the United States for the Middle District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Middle District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed and the cause remanded with directions that the appellant be discharged from custody.

Dated September 14, 1948

McLaughlin,
Circuit Judge.

Endorsements:

Judgment Reversing Judgment of District Court etc.
Received and Filed Sept. 14, 1948.
Ida O. Creskoff, Clerk

343 United States Circuit Court of Appeals
For the Third Circuit

(TITLE OMITTED)

Notice of Motion for Release

Comes now the petitioner-appellant above named, who respectfully moves this Court at a term thereof to be held October 4, 1948 at the United States Court House in the City of Philadelphia, Pa. at the opening of Court on that day or as soon thereafter as counsel may be heard, for an order directing the Warden of the United States Penitentiary at Lewisburg, Pennsylvania, to forthwith release or enlarge from custody the petitioner-appellant, Bernard W. Smith, No. 14290, on his own recognizance pending the application of the appeal to the United States Supreme Court, and further pending the possible review of such proceeding by the United States Supreme Court.

DANIEL F. MATHEWS,
Attorney for Petitioner-Appellant.
Office & P. O. Address.
913-919 University Bldg.,
Syracuse, New York.

To:
Clerk of the U. S. Court of Appeals
for the Third Circuit.
2046 U. S. Court House.
Philadelphia, Pa.

To:
Arthur A. Maguire.
U. S. Attorney.
Scranton, Pa.

To:
Major Thayer Chapman.
United States Army.
Judge Advocate General's Office.
Washington, D. C.

344 In the United States Circuit Court of Appeals
For the Third Circuit.

Petition for Release—Filed Sept. 27, 1948

To the United States Circuit Court of Appeals for the Third Circuit:

The petition of DANIEL F. MATHEWS respectfully shows the Court:

1. That he is an attorney and counselor at law licensed to practice his profession in the State of New York and the United States Court of Appeals for the Third Circuit, with an office for the practice of his profession at 919 University Bldg., Syracuse, New York.

2. That the petitioner has represented the above named defendant Smith, for upwards of two years.

3. That in the proceedings in this Court Smith has been declared a pauper and is prosecuting this action at the present time as a pauper.

4. That pursuant to a decision of this Court under date of September 14, 1948, the defendant, Smith, was ordered released from custody in the United States Penitentiary at Lewisburg, on the ground that the court martial which convicted and sentenced him lost its jurisdiction by failure to respect the rights of the defendant herein.

5. That the defendant Smith has been in the army since 1942 and been in prison since July, 1944.

6. That he has no funds.

7. That the petitioner was employed by Smith's mother after she had consulted a number of other lawyers to take such steps as might be necessary to effect his release.

8. That the petitioner has heretofore traveled to Washington on four occasions and interviewed Congressman and Government and Army officials in connection with the release of the defendant; that the petitioner visited the defendant in prison on two or three occasions and went to Lewisburg on two or three other occasions in connection with this case.

345 9. That a writ of habeas corpus was issued in this case, an elaborate and comprehensive brief prepared and submitted, and the writ was denied by Mr. Justice Follmer, United States District Judge, in August, 1947.

10. That the petitioner thereafter went to Philadelphia on three occasions, checking law and ascertaining information concerning the ways and means and rules of appealing this case.

11. That the petitioner has expended large sums of money in telephone calls and travel expense over a period of two years, and extra clerk hire and stenographic work; that the petitioner has received approximately $600.00 to date in this case and has expended nearly twice as much in expenses.

12. That the mother of the defendant herein is unable to post bail and that there is no person willing to post bail in this case.

13. That the Court has determined that the defendant's cause is meritorious. The Court has found that the conviction is illegal and hence the sentence of imprisonment is illegal. The petitioner contends that the dishonorable discharge is also illegal in view of the determination of the Court as set forth in its opinion.

14. The petitioner has been advised by the United States Attorney in writing that an application for a certiorari to the United States Supreme Court would be requested and that pursuant thereto the defendant would be confined in jail for thirty days under an automatic stay of mandate.

15. Considering the facts in the case herein together with the determination of law as found by this Court, it is urged that the defendant should now be released on his own recognizance.

16. The defendant has been determined to be not guilty and in effect acquitted of the charges as of the present time. Pending the application for a certiorari or the determination of the United States Supreme Court in the event certiorari should be granted, the defendant should be at liberty.

WHEREFORE, the petitioner respectfully prays that this Court direct the release of the defendant, Bernard
346 Smith, from the United States Penitentiary at Lewisburg, Pennsylvania, forthwith on his own recognizance, pursuant to the rules of the United States Court of Appeals for the Third Circuit.

DANIEL F. MATHEWS.

Duly sworn to by Daniel F. Mathews jurat omitted in printing. (All in italics)

347 In the United States Circuit Court of Appeals
For the Third Circuit

BERNARD W. SMITH, PETITIONER-APPELLANT,

vs.

WILLIAM H. HARE, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA, RESPONDENT-APPELLEE

State of New York,
County of Onondaga, } ss.:

ANNE MILLER, being duly sworn, deposes and says:

That she resides at 2513 Grant Boulevard, Syracuse, New York; that she is the mother of Bernard W. Smith, the above named petitioner-appellant; that said Bernard W. Smith is the only child of the deponent herein; that the father of the child John Smith, died a resident of the City of Syracuse in 1921; that the deponent thereafter married George Miller in the year 1929.

That Bernard W. Smith was born April 21, 1911; that at the time of John Smith's death the respondent-appellant, Bernard W. Smith, was 10 years old; that the deponent remained unmarried and brought up Bernard Smith.

That on May 11, 1928 Bernard Smith joined the United States Navy; that after Bernard left for the navy the deponent married her present husband, George Miller, and they have lived together continuously since the day of said marriage and still reside together at the address afore-said.

That during the period of time from Mr. Smith's death in 1921 to the time Bernard joined the navy in 1928 the deponent worked at the L. C. Smith Typewriter Plant in Syracuse, New York, and supported and maintained and brought up the petitioner-appellant, Bernard Smith; that at the time Bernard joined the navy he was 17 years old and he studied while in the navy and obtained sufficient credits to have the equivalent of a high school diploma.

That in the Spring of 1942 the petitioner-appellant, Smith, entered the service and went overseas shortly there-after.

348 That he was convicted of the present crime in England in the Summer of 1944 and has been in confinement continuously since.

That the deponent consulted with Irving Higbee, the present U. S. District Attorney who was also President of the Onondaga County Bar Association, and Mr. Higbee recommended several lawyers, and finally the deponent

consulted Daniel E. Mathews of the firm of Driscoll, Mathews & Gingold in about May, 1942 and that firm has handled the case continuously to date.

That the deponent and her husband do not own their own home; that her husband and the stepfather of the petitioner-appellant is employed as a packer at Barbans & Black Warehouse (wholesale hardware dealer) and that the deponent is presently employed at the Prosperity Company, manufacturers of garment presses, and has been so employed since about November, 1942.

That the deponent works 40 hours a week at the Prosperity Company and earns on an average of $41.00 a week gross, and after various deductions for taxes, etc., receives approximately $36 per net of take home pay; that the only funds owned by the deponent is a bank account in the First Trust & Deposit Company in which there is a balance of approximately $1000. Deponent has approximately $187.00 in war bonds, current value.

That the deponent is unable to provide bail for her son, Bernard Smith, owning no property and having no means save her salary; that she is unable to deposit any sum with any bonding company for the purpose of obtaining a bail bond from any surety company; that she has paid her attorney approximately $500 and that he has traveled to Washington on four occasions, to Lewisburg, Pa. on five occasions, to Philadelphia, Pa. on two occasions, and has advanced such monies as were necessary to care for the fees and disbursements up to the present time.

After the appeal was filed in this court an order was obtained declaring the defendant a pauper; that the deponent knows of her own knowledge that the amount expended by her to her attorney have not been adequate to care for the actual disbursements made in this matter and that nothing has been paid for services.

That as of this date, Bernard W. Smith, the only son of this deponent herein, has spent four years and three months in jail on a conviction which has been adjudged by this court to be invalid.

Deponent prays that this court make an order pursuant to the rules in this court releasing the defendant on his own recognizance pending the determination of the Government's appeal. In the event the Government should ultimately be successful nothing would be lost. In the event the Government should either be denied a certiorari to the United States Supreme Court or in the event that the certiorari is granted and the Government should be un-

successful in the appeal, nothing can return to the defendant the four years of confinement already served.

Wherefore, the deponent prays that this court direct that the defendant be released forthwith on his own recognizance pending the determination of the application for certiorari, and, if the application be granted, pending the final determination and judgment of the United States Supreme Court.

Adolf Mueller

Duly sworn to by Adolf Mueller [illegible] omitted in printing.

(All in italics)

354 United States Court of Appeals for the Third Circuit

(Title omitted)

Order of Release—Oct. 8, 1948

Present: Goodrich, McLaughlin and O'Connell,
Circuit Judges.

Upon consideration of the Petition, by Appellant for release from custody, and the Affidavit of counsel for appellee in opposition thereto, and after full hearing,

It is Ordered that the appellant, Bernard W. Smith, be released from custody upon posting bail in the sum of five thousand dollars ($5,000.00).

By the Court,
Herbert F. Goodrich,
Circuit Judge.

October 8, 1948.

355 I, Ida O. Cresskoff, Clerk of the United States Courts of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original proceedings in this Court in the case of Bernard W. Smith, Appellant, vs. William H. Hiatt, Warden, United States Penitentiary, Lewisburg, Pa., No. 9769, on file and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 12th day of October in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the United States the one hundred and seventy-third.

Ida O. Cresskoff,
Clerk of the U. S. Court of Appeals,
Third Circuit.

(SEAL)

In the Supreme Court of the United States

October Term, 1948

No.

WILLIAM H. HAYES, Warden, [illegible] Penitentiary, Lewisburg, Pennsylvania, Petitioner,

v.

BENJAMIN W. SMITH

Stipulation as to Contents of Printed Record On Petition for Writ of Certiorari

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that upon the hearing of the petition for a writ of certiorari the printed record shall consist of the following papers and documents, the originals or certified copies of which are now on file with the Clerk of this Court:

(1) Docket entries in habeas corpus proceeding.

(2) Petition for writ of habeas corpus filed January 2, 1947.

(3) Rule to show cause, filed January 27, 1947.

(4) Response to rule to show cause, filed January 28, 1947.

(5) Order of District Court to produce habeas corpus petitioner at hearing, filed February 4, 1947.

(6) Transcript of hearing on rule to show cause, held February 11, 1947.

(7) Government's Exhibit No. 1 at hearing, consisting of photostatic copy of the court-martial proceedings and allied documents.

(8) Government's Exhibit No. 2 at hearing consisting of photostatic copy of Application for Appointment of Harry Lieberman in Officers' Reserve Corps of Army.

357 (9) Opinion and Order of District Court denying petition for writ of habeas corpus and dismissing rule to show cause, filed August 7, 1947.

(10) Notice of appeal, filed September 5, 1947.

(11) District court's order of December 24, 1947, directing clerk to send original papers and exhibits to Court of Appeals in lieu of copies thereof.

(12) Order of Court of Appeals of October 24, 1947, permitting appellant to proceed on appeal *in forma pauperis*.

(13) Opinion of Court of Appeals, filed September 14, 1948.

(14) Judgment of Court of Appeals, filed September 14, 1948.

(15) Appellant's motion to be enlarged on his own recognizance, and affidavits of Daniel F. Mathews and Addie Miller in support thereof, filed September 22, 1948.

(16) Order of Court of Appeals of October 8, 1948, directing appellant's release from custody upon posting bail in the sum of $2,000.

(17) Certificate of clerk of Court of Appeals.

(18) This stipulation.

It is further stipulated and agreed that in the event the petition for a writ of certiorari is granted the printed record shall consist of the same printed record as that used in connection with the petition for the writ, plus the order granting certiorari.

PHILIP B. PERLMAN,
Solicitor General.

DANIEL F. MATHEWS,
Attorney for Respondent.

November 5, 1948.

In the Supreme Court of the United States

October Term, 1948

No. 457

WILLIAM H. HYATT, Warden of the State Penitentiary at Lewisburg, Pennsylvania, petitioner

v.

BENJAMIN W. SMITH

Stipulation correcting errors in the printed record

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the printed record herein is in the two following particulars, and that it should be deemed to read in the corrected manner indicated:

1. On page 90, immediately following the heading "Exhibit 'B,'" and before the paragraph commencing "Original statements" there is a substantial omission. The omitted language appears, however, at a later point in the record, to wit, beginning with the words "Statement of Miriam Florence Cullum," at page 258, immediately following the heading "Defendant Exhibit B," and extending to (but excluding) the heading "Government's Exhibit No. 2," at page 260. Consequently, page 90 should be deemed to read as though this language were interlineated at the point indicated.

It should be pointed out, however, that the language next recited to at pages 258-260 also properly appears at that point in the record.

2. The first paragraph on page 90, beginning with the words "Original statements," is slightly garbled, owing to the fact that the perforations caused by the binding holding the original papers of the court martial record together caused the paragraph to be partially illegible to the printer. The paragraph should read as follows:

"Original statements on the pocket book of P. C. 306 Felton. Pages Nos. 131-137, and 142, taken at 7 P. M. 12-7-44 at No. 27, Colchester Rd. Lawford, and at 7.15 p. m. 12-8-44 at Lexton Aerodrome, respectively."

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

Daniel F. Mathews,
DANIEL F. MATHEWS,
Attorney for Respondent.

JANUARY 5, 1949.

821231 49

Supreme Court of the United States

Order allowing certiorari.

Filed February 7, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1949